TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. ~~853~~ 17

MECHANICS UNIVERSAL JOINT COMPANY AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED, PETITIONERS,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 24, 1936.

CERTIORARI GRANTED APRIL 27, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 853

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1 Pleas in the District Court of the United States for the Northern District of Illinois, Western Division, begun and held at the United States Court Room, in the City of Freeport, in said District and Division, before the Honorable Charles E. Woodward, District Judge of the United States for the Northern District of Illinois on Seventeenth day of November, in the year of our Lord one thousand nine hundred and thirty-one, being one of the days of the regular October Term of said Court, begun Monday, the Nineteenth day of October, and of our Independence the 156th year. Plac

Present:

Honorable Charles E. Woodward
H. C. W. Laubenheimer, U. S. Marshal.
Charles M. Bates, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Western Division.

L. B. Achor, Receiver of The Manufacturers Nat'l. Bank and Trust Company of Rockford, Illinois,
vs.
Mechanics Universal Joint Company, a corporation, & Eric S. Ekstrom.
} No. 348 In Equity.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Bill of Complaint in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Western Division, on this the eighth day of October 1931.

3 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

To the Honorable Presiding Judge of Said Court in Chancery Sitting:

Your orator L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, plaintiff, complains of Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, defendants, and represents to the court as follows:

1. That The Manufacturers National Bank and Trust Company of Rockford, Illinois, was on June 13, 1931 and prior thereto a national banking corporation organized and existing under the laws of the United States; that on June 16, 1931, the Comptroller of the Currency of the United States executed and delivered his certificate to the effect that said The Manufacturers National Bank and Trust Company of Rockford, Illinois was then and there insolvent and appointed L. B. Achor, Receiver of the said The Manufacturers National Bank and Trust Company of Rockford, Illinois. That the Mechanics Universal Joint Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal office at Rockford

in said District. That Eric S. Ekstrom is President of the said Mechanics Universal Joint Company and resides at Rockford in said District; that each and all of said par-
4 ties are residents and citizens of said District and Division.

2. The grounds upon which the court's jurisdiction depends is the fact that the said The Manufacturers National Bank and Trust Company of Rockford, Illinois, was a national banking corporation organized under the laws of the United States and is insolvent and is in process of liquidation through the Comptroller of the Currency of the United States, represented by L. B. Achor, Receiver, appointed by said Comptroller of the Currency of the United States to wind up the affairs of the said The Manufacturers National Bank and Trust Company of Rockford, Illinois.

3. That said Eric S. Ekstrom, was on June 12, 1931, and for a long time prior to that date had been, a Director of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, having been previously elected to said office, and having qualified and was acting as such Director on said June 12, 1931, and for a long time prior thereto; and said Eric S. Ekstrom continued to act as a Director of said bank until said bank suspended and failed to open its doors on the morning of June 15, 1931. That on said June 12, 1931, and for a long time prior thereto said Eric S. Ekstrom was and had been the President of the said defendant Mechanics Universal Joint Company, a corporation and had been acting as such and was in the active prosecution of his duties as President of said corporation. That on said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and while he was then and there President of the said Mechanics Universal Joint Company, a corporation, attended a meeting of the Directors of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, at the banking house of said banking corporation at Rock-
5 ford in said District. That at said Directors Meeting and while the said Eric S. Ekstrom was present, a National Bank Examiner, acting under and by virtue of the authority of the United States, through the Comptroller of the Currency of the United States and in the performance of his duties as a National Bank Examiner, was also then and there present, and at said meeting while said Eric S. Ekstrom was present, the affairs of said The Manufacturers National Bank and Trust Company were discussed and it was then and there stated in effect, that the affairs of said bank were in such

condition that it was likely that said bank could not continue in business and could not continue as a national bank with ability to pay its creditors, and that it was necessary that steps be taken to save said bank from collapse, and it was then and there discussed in said meeting that it was advisable to endeavor to consolidate said bank with another bank in the City of Rockford in order to prevent the open insolvency of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and that the Directors of said bank then and there passed a Resolution giving authority to said National Bank Examiner to discuss the affairs of said bank with any other bank in said City of Rockford with a view of having said other bank take over the affairs of The Manufacturers National Bank and Trust Company of Rockford, Illinois, and to receive the assets of said bank and assume its liabilities. And it was then and there stated that in the situation which then existed in Rockford and was likely to exist within the next few days it would be impossible for said bank to continue to function as a national bank unless the relief discussed was afforded said bank. That said Eric S. Ekstrom was present during all of said meeting and heard all of the said discussion above mentioned and was then and there advised and duly informed of the then situation of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and while the said Eric S. Ekstrom was then and there acting as President and Managing head of the said Mechanics Universal Joint Company, a corporation.

That said Eric S. Ekstrom, Director as aforesaid, and President as aforesaid, left said meeting at about twelve o'clock noon, on said June 12, 1931, and immediately thereafter, having the knowledge and information which he had gained at said Directors' meeting of said bank as aforesaid, caused a check of the funds of the said Mechanics Universal Joint Company, a corporation, which were then and there on deposit in said The Manufacturers National Bank and Trust Company of Rockford, Illinois, in the sum of $42,761.12, to be withdrawn from said The Manufacturers National Bank and Trust Company, by a check then and there drawn by said Mechanics Universal Joint Company, a corporation, and duly signed by the duly authorized officer of said corporation; that said check was dated June 12, 1931 and was deposited in the Third National Bank Rockford, Illinois, on said date and reached said The Manufacturers National Bank and Trust Company of Rockford, Illinois, through the clearings on June

13, 1931, which said check was then and there on said last mentioned date paid by said bank, and said funds then and there thereby completely withdrawn from said bank and thereby transferred from said The Manufacturers National Bank and Trust Company of Rockford, Illinois, to the Third National Bank, Rockford, Illinois. That said Eric S. Ekstrom, President of said corporation as aforesaid, and Director of said Bank as aforesaid caused said transfer to be made because of the information which he acquired at said Directors' Meeting.

4. That said action of said Eric S. Ekstrom, as aforesaid, in addition to the fact that it was done under information which he had acquired in a confidential relation with said The Manufacturers National Bank and Trust Company of
7 Rockford, Illinois, was made in contemplation of the insolvency of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and was made with a view to prevent the application of the assets of said The Manufacturers National Bank and Trust Company of Rockford, Illinois; in the manner prescribed by the laws of the United States with reference to National Banks and the distribution of their assets upon insolvency and with a view to the preference of one creditor, towit, the Mechanics Universal Joint Company, a corporation of which he, the said Eric S. Ekstrom was then and there President, to another, and to the other creditors of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, all of which was in violation of the laws of the United States with reference to National Banks and the distribution of their assets upon insolvency.

5. That there are no other persons interested in the matters in controversy mentioned above, other than the plaintiff and the defendants.

Forasmuch Therefore, as the plaintiff is without remedy in the premises except in a court of equity he prays as follows:

First,—That the said Mechanics Universal Joint Company, a corporation, organized and existing under the laws of the State of Illinois, having its principal office at Rockford, Illinois, and the said Eric S. Ekstrom, be each made parties defendant to this bill and required to answer the same, but not under oath the answer under oath being hereby waived.

Second,—That upon a hearing of this bill, it may be found and decreed by the court that said Eric S. Ekstrom occupied a dual and confidential relation with reference to said The

Manufacturers National Bank and Trust Company of Rockford, Illinois, and the said Mechanics Universal Joint Company, a corporation, and that he used information which he gained in confidence at a meeting of the Directors of said
8 The Manufacturers National Bank and Trust Company of Rockford, Illinois, to the wrongful benefit and advantage of the said Mechanics Universal Joint Company, a corporation.

Third,—That it may be found and decreed by the court that the act of said Eric S. Ekstrom and said Mechanics Universal Joint Company, a corporation in issuing said check above mentioned, and depositing the same in the Third National Bank Rockford, Illinois, and in thereby withdrawing the funds of said Mechanics Universal Joint Company, from said The Manufacturers National Bank and Trust Company of Rockford, Illinois, was made in contemplation of the insolvency of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and made with a view to prevent the application of the assets of said bank in the manner prescribed by the laws of the United States, and with a view to the preference of one creditor to another.

Fourth,—That said defendants and each of them be ordered and directed by this court to return to the plaintiff said sum of $42,761.12, together with interest, at the rate of five percent per annum from said June 13, 1931, to the date said fund is returned to said Receiver.

Fifth,—That upon failure, if there should be any, of the said defendants to return said fund, together with interest to the said Receiver of said bank, that the said Eric S. Ekstrom be attached and imprisoned until he shall have obeyed the order of this Court.

Sixth,—That a money decree be rendered in favor of the plaintiff and against each of the defendants for the said sum of $42,761.12, with interest at the rate of five percent per annum from said June 13, 1931, to the date of said decree.

Seventh,—That the plaintiff recover of the defendants all costs of this proceeding.

9 Eighth,—That upon the filing of this bill in the office of the Clerk of said court that the subpoena in chancery be issued out of the office of the Clerk of said court, directed and returnable as required by law commanding each of the defendants to appear and answer this bill as required by law and the equity rules of this court.

L. B. Achor,
Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois. *Plaintiff.*

State of Illinois }
Winnebago County } ss

L. B. ACHOR, being first duly sworn upon oath deposes and says that is Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, and plaintiff in the above entitled cause; that he has signed said bill as such Receiver and that the statements therein contained are true.

L. B. ACHOR,
Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois.

Subscribed and sworn to before me this 7th day o
1931. red Nov. 1931.

LUETTA E.
(Seal) *Notary Public.*
ROY F. HALL,
Rockford, Illinois,
Solicitor for Plaintiff.

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10 And on, to wit, the Second day of Novembe
the Defendant by his attorneys and filed in
office of said Court at Freeport a certain Demurrer in words and figures following, to wit:

11 IN THE UNITED STATES DISTRICT COURT.
* * (Caption) * *

DEMURRER.

This defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true in such manner and form as the same are therein set forth and alleged, does demur to the said bill and for cause of demurrer shows that the said complainant has not by his said bill made such a case as entitles him in a court of equity to any discovery from this defendant, or any relief against him as to the matters contained in the said bill, or any part of such matters, and that any discovery which can be made by this defendant touching the matters complained of in the said bill, or any of them, can not be of any avail to the said complainant for any of the purposes for which a dis-

covery is sought against this defendant by the said bill or as entitles the said complainant to any relief in this Court touching any of the matters therein complained of.

Wherefore and for divers other good causes of demurrer appearing in the said bill, this defendant does demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any further or other answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

EARLY & EARLY,
His Solicitors.

And afterwards, to wit, on the Seventeenth day of November, 1931 being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge appears the following entry, to wit:

IN THE UNITED STATES DISTRICT COURT.

• • (Caption) • •

ORDER.

On this day this cause coming on to be heard on motion of the plaintiff L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, by his attorney, to strike demurrer filed November 2nd, 1931 by Eric S. Ekstrom, by his attorneys, and for a decree pro confesso, and the Court having listened to the motion and heard arguments of counsel and being fully informed in the premises it is Orde d by the Court that the motion to strike the demurrer filed November 2nd, 1931 by Eric S. Ekstrom, by his attorneys, be and the same is hereby sustained and that decree pro confesso as to defendant Eric S. Ekstrom, be, and the same is hereby entered herein, and leave granted to defendant Eric S. Ekstrom to file answer instanter to the Bill of Complaint herein. Enter

CHARLES E. WOODWARD,
Judge.

15 And on, to wit, the Twenty-ninth day of October, 1931 Filed 193
came the Mechanics Universal Joint Company by its attorneys and filed in the Clerk's office of said Court at Freeport a certain Answer in words and figures following, to wit:

16 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption) • •

THE ANSWER OF MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, ONE OF THE ABOVE NAMED DEFENDANTS, TO THE BILL OF COMPLAINT OF L. B. ACHOR, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY, OF ROCKFORD, ILLINOIS, PLAINTIFF.

I.

This defendant admits that The Manufacturers National Bank and Trust Company, of Rockford, Illinois, was, on June 13, 1931, and prior thereto had been, a national banking corporation organized and existing under the laws of the United States; but as to whether on June 16, 1931 the Comptroller of the Currency of the United States executed and delivered his certificate to the effect that the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, was then and there insolvent, or as to whether said certificate
17 appointed L. B. Achor Receiver of said Bank, this defendant has no knowledge and therefore denies the same.

This defendant admits that the Mechanics Universal Joint Company is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal office in Rockford, in said District, and admits that Eric S. Ekstrom is President of this defendant, and resides in Rockford, in said District.

II.

Further answering, this defendant admits the grounds upon which the jurisdiction of this Court depends as stated in paragraph II of said bill of complaint, but denies that the relief asked for by said bill of complaint is of an equitable nature and denies the jurisdiction of a Court of Equity to entertain said bill.

III.

For answer unto paragraph III of said bill of complaint, this defendant states that it has no knowledge as to whether on June 15, 1931, and for a long time prior to that date, said Eric S. Ekstrom had been a director of said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, nor has it any knowledge as to whether or not he had been elected to said office; or qualified and was acting as such on June 12, 1931, and for a long time prior thereto; or as to whether said Eric S. Ekstrom continued to act as a director of said Bank until said Bank was suspended and failed to open its doors on the morning of June 15, 1931, and that it is not in a position to either admit or deny said facts, or any of them, and claims the same benefit of this Answer as if it had specifically denied said facts. However, this defendant admits that on June 12, 1931, and for a long time prior thereto, said Eric S. Ekstrom was and had been the President of this defendant corporation and had been acting as such and was in the active prosecution of his duties as President of this corporation.

Further answering said paragraph III of said bill of complaint, this defendant says that it has no knowledge, but believes it to be true, that on June 12, 1931, the said Eric S. Ekstrom attended a meeting of the directors of said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, at the banking house of said banking corporation, at Rockford, Illinois, in said District, but as to whether or not said Eric S. Ekstrom attended as a director of The Manufacturers National Bank and Trust Company, of Rockford, Illinois, this defendant has no knowledge and therefore claims the same benefit of this Answer as if it had expressly denied the same; that this defendant has no knowledge and cannot either admit or deny whether the discussions, matters and things charged in said paragraph III of said bill of complaint to have occurred at said meeting did in fact take place and occur as charged in said bill of complaint, and therefore claims the same benefit of this Answer as if it had specifically denied each and every of such discussions, matters, things and occurrences at said meeting; but this defendant expressly denies that said Eric S. Ekstrom heard all of the said discussions mentioned in said paragraph III of said bill of complaint; and denies that he was then and there advised and duly informed of

the then situation of the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, as is charged in paragraph III of said bill.

Further answering said paragraph III of said bill of complaint, this defendant admits that on June 12, 1931, this defendant did cause a check on the funds of this defendant which were then and there on deposit in the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, in the sum of Forty-two Thousand Seven Hundred Sixty-one Dollars and Twelve Cents ($42,761.12), and that it thereafter, on the thirteenth day of June, 1931, transferred said fund of Forty-two Thousand Seven Hundred Sixty-one Dollars and Twelve Cents ($42,761.12), being a portion of its deposit on said day of, to wit, Sixty-three Thousand Two Hundred Twenty-four Dollars and Thirty Cents ($63,224.30) in said Bank, to the Third National Bank, of Rockford Illinois; but this defendant avers that said fund was transferred in the usual course of business of this defendant and in line with its regular and accustomed practice in the City of Rockford, and denies that said transfer by means of said check was made because of or as the result of the knowledge and information which the said Eric S. Ekstrom had gained at said directors' meeting of said Bank, if he gained any information at said meeting, and denies that said check was drawn by this defendant with the knowledge or information that said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, was at said time insolvent,
20-21 or that it contemplated insolvency; but this defendant admits that on the thirteenth day of June, 1931, said check was paid by said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, and admits that the funds then and there represented by said check were completely withdrawn from said Bank and thereby transferred from said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, to the Third National Bank, of Rockford, Illinois, but expressly denies that said Eric S. Ekstrom caused said transfer to be made because of the information which he acquired at said directors' meeting, if he did acquire any information at said meeting. And this defendant states that the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, had not, prior to the time said check was drawn or presented and paid by said Bank, committed any act of insolvency; that said Bank had been continuously open for more than six months prior to June 13, 1931, and had been continuously

open on banking days for said period, and thereby held itself out as a solvent bank and authorized to receive deposits therein; that so far as this defendant is advised there had been no material change in the financial condition of said Bank during the period of, to wit, six months prior to June 13, 1931; that nothing had occurred in the affairs of said Bank which rendered its financial condition any different on the thirteenth day of June, 1931 from what it had been
22 for several months previous to said date; that said sum of Forty-two Thousand Seven Hundred Sixty-one Dollars and Twelve Cents ($42,761.12) so withdrawn by this defendant, by means of said check, from its deposit with said Bank, represented sums that had been deposited by this defendant with said bank at different times from May 1, 1931 to June 6, 1931, and consisted in a very large part of deposits that were made by this defendant with said Bank on June 6, 1931; that all of the deposits made by this defendant with said Bank during the months of May and June, 1931, were made by this defendant at times when said Bank was open for banking business and receiving deposits from its customers and the public on all banking days; and that the fact that said Bank was kept open for business and receiving deposits on all banking days during said period amounted to a representation on the part of said Bank, and the officers thereof, that said Bank was a solvent, going institution, and a Bank which could lawfully receive deposits from its customers; that during the months of May and June, 1931, and at the time when this defendant made each and every of the deposits aforesaid, this defendant had no knowledge or information or suspicion that said Bank was not a solvent institution and a safe place in which to deposit money; and that in making said deposits it acted upon the representations so made by the said Bank and its officers that said Bank was a solvent banking institution. And this defendant avers that if said Bank was insolvent, as alleged in said bill of complaint, on the thirteenth day of June, A. D.
23 1931, it had been insolvent during the whole of the months of May, 1931 and June, 1931, and for many months prior thereto, and that the receipt of said deposits by said Bank, being then and there insolvent, was a fraud on this defendant, and that because of said fraud the title to said deposits so received continued to remain in this defendant after the deposits were so made in said Bank; and that this defendant had the right to withdraw all or any portion of its deposits which it had been induced to make

in said Bank by the fraudulent representations made by said Bank and its officers in keeping said Bank open for the receipt of deposits, and thereby representing that it was solvent at the time said deposits were so made; and that the withdrawal of said sum of Forty-two Thousand Seven Hundred Sixty-one Dollars and Twelve Cents ($42,761.12) on the thirteenth day of June, 1931, by this defendant, under the circumstances aforesaid, was a lawful withdrawal on the part of this defendant and was not in violation of law, nor was it such a withdrawal as, under the laws of Congress, was null and void.

IV.

Answering paragraph IV of said bill of complaint, this defendant denies that any action of Eric S. Ekstrom in the premises was done under information which he had acquired in a confidential relation with said The Manufacturers National Bank and Trust Company, of Rockford, Illinois,
24 and denies that said withdrawal was made in contemplation of the insolvency of the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, and denies that it was made with a view to prevent the application of the assets of the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, in the matter prescribed by the laws of the United States with reference to national banks and the distribution of their assets upon insolvency; and avers that the whole of its balance on deposit in said bank on, to wit, the thirteenth day of June, 1931, had been deposited in said bank by this defendant, relying upon the representations so made by said Bank and its officers that said Bank was solvent and that said balance was therefore a trust fund, held by said Bank for this defendant as beneficiary, and that said fund was not a part of the assets of said Bank, distributable to its general creditors on insolvency; and denies that said withdrawal was made with a view to the preference of one creditor, to wit, this defendant, to another, and to the other creditors of the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois; but on the contrary avers that said withdrawal was made in the usual course of business of this defendant and not for any unlawful purpose or with any unlawful intent whatever.

V.

This defendant admits that no other persons are interested in the matters in controversy mentioned in said bill of complaint other than the complainant and the defendants, but denies that the defendant, Eric S. Ekstrom is interested in any of said matters in controversy.

25 Counterclaim.

And the Mechanics Universal Joint Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in Rockford, in the State of Illinois, and in this District, by way of a cross bill herein against the plaintiff above mentioned, and also by way of counter claim and further answer, avers as follows:

I.

That continuously from the first day of January, A. D. 1931, down to and including the thirteenth day of June, A. D. 1931, The Manufacturers National Bank and Trust Company, of Rockford, Illinois, was a national banking corporation organized and existing under and by virtue of the laws of the United States, and that during said period it maintained a banking house in the City of Rockford, In the State of Illinois, in said District, and in said banking house conducted a banking business and during the whole of said period kept its bank open continuously during banking days and banking hours and by such action represented to the public that it was a solvent, going banking institution and a safe place in which to deposit money; that during the whole of said period said Bank was, in fact, insolvent.

II.

That the Mechanics Universal Joint Company, a corporation, as aforesaid, relying upon the representations so made by said The Manufacturers National Bank and Trust
26 Company, of Rockford, Illinois, in keeping its Bank open and doing business and relying upon the representation thereby made that said Bank was solvent, and then and there believing that said bank was solvent, made deposits of its

money and of its checks and bills of exchange in said Bank during said months of May and June, 1931, as follows:

Date	Deposits
May 6th	$ 167.19
May 9th	28,021.33
May 15th	24,911.68
May 18th	25,000.00
May 23rd	534.35
May 25th	4,163.00
May 28th	2,928.61
May 29th	10,149.61
May 30th	284.44
June 1st	10,095.28
June 6th	44,617.21

And all of which said deposits were received by said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, as deposits of cash, and the account of said Mechanics Universal Joint Company was credited on the books of said Bank to the credit of said Mechanics Universal Joint Company; all of which said deposits so solicited and received by said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, under the circumstances aforesaid, and when said Bank was insolvent, constituted a fraud upon said Mechanics Universal Joint Company, said corporation, and that by reason of said fraud so perpetrated by said The Manufacturers National Bank and Trust Compny, of Rockford, Illinois, upon said Mechanics Universal Joint Company, the title to said sums of money so represented by said deposits never passed to said The Manufacturers National Bank and Trust Company, of
27 Rockford, Illinois, but in law remained in the Mechanics Universal Joint Company, said corporation; and still remains in said Mechanics Universal Joint Company, and the same was received by said L. B. Achor, said Receiver of Bank, as a trust fund which in equity belongs to and is the property of this defendant; and that there remained in said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, on the fifteenth day of June, 1931, at the time the said Receiver was appointed, credited to the account of this defendant, the sum of Twenty Thousand Thirty-four Dollars and Twelve Cents ($20,034.12), all of which had been deposited when said Bank was insolvent and which, in equity and good conscience, by reason of the circumstances under which said deposits were made, belonge to and is the property of this defendant and should be paid to this de-

fendant before the assets of said Bank in the hands of said Receiver are distributed to the general creditors of said Bank.

Wherefore the Mechanics Universal Joint Company, aforesaid, prays that an accounting may be taken in this behalf and that in and by such accounting it be determined what funds and moneys and property of the Mechanics Universa Joint Company were deposited by said Mechanics Universal Joint Company in the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, at the time or times when said Bank was insolvent and when said Bank was holding itself out to the public as a solvent, going institution by keeping its banking house open for the conduct of a banking business and for the reception of deposits, and
28 that a decree may be entered herein against the said plaintiff, L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company, of Rockford, Illinois, ordering and directing him, out of the funds and assets in his hands as such Receiver, to pay to the Mechanics Universal Joint Company such sum of Twenty Thousand Thirty-four Dollars and Twelve Cents ($20,034.12), together with legal interest thereon from the date of deposit of the same, before making distribution of any of the assets of said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, to the general creditors thereof; and that this defendant may have such other and further relief in the premises as equity may require and to your Honor shall seem meet.

Wherefore this defendant prays that the said bill of complaint be dismissed as against it, and that it be awarded such relief as it may be entitled to under and by virtue of said cross bill and counterclaim.

MECHANICS UNIVERSAL JOINT COMPANY,
By W. E. GUSTAFSON,
Its Assistant Secretary.

G. A. SHALLBERG,
S. R. KENWORTHY,
Moline, Ill.
Attorneys for said Defendant.
SHELBY L. LARGE,
GUY B. RENO,
Rockford, Ill.

29 And on, to wit, the Seventeenth day of November, 1931 came the defendant, Eric S. Ekstrom by his attorneys and filed in the Clerk's office of said Court at Freeport a certain Separate answer in words and figures following, to wit: Filed N 1931.

30 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

SEPARATE ANSWER OF ERIC S. EKSTROM ONE OF THE DEFENDANTS HEREIN, TO THE BILL OF COMPLAINT HEREIN.

1.

And this defendant, Eric S. Ekstrom, answering the bill of complaint of L. B. Achor, Receiver of The Manufacturing National Bank and Trust Company of Rockford, Illinois, admits that The Manufacturers National Bank and Trust Company of Rockford, Illinois, was on June 13, 1931, and prior thereto had been a national banking corporation organized and existing under the laws of the United States; that on June 16, 1931, the Comptroller of the Currency of the United States executed and delivered his certificate appointing L. B. Achor, Receiver of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, but in that connection this defendant denies that said bank was then insolvent; admits that the Mechanic's Universal Joint Company, one of the defendants in this cause, is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, having its principal office at Rockford in said District; that this defendant is President of the said Mechanics Universal Joint Company and resides at Rockford, Illinois in said District; that each and all of said parties are residents and citizens of said District in said Division thereof.

31

2.

Further answering this defendant admits only this Court's jurisdiction of the subject matter herein, as alleged in Paragraph 2 of the bill of complaint herein; but this defendant denies that June 16, 1931, or at any time prior thereto, said bank was at any time insolvent and denies the jurisdiction of this Court as a Court of Equity to entertain this bill of complaint against this defendant personally or joined with

the other defendant herein, Mechanics Universal Joint Company, a corporation.

3.

This defendant answering paragraph 3 of said bill admits that on June 12, 1931, and for a long time prior thereto, he was a Director of said bank and also, President of said Mechanics Universal Joint Company, but denies that he was in the active prosecution of his duties as President of said corporation, but states the fact to be that said corporation was a subsidiary of and owned and controlled by The Borg-Warner Corporation, a foreign corporation licensed to do business in Illinois; admits that he attended a Directors' 32 Meeting of said bank on June 12, 1931, at which a national bank examiner was present and presumably acting under and by virtue of the authority of the United States; denies that it was then and there stated in effect that the affairs of said bank were in such condition that it was likely, that said bank could not continue in business and could not continue as a national bank with ability to pay its creditors and that it was necessary that steps be taken to save said bank from collapse; admits that it was then and there discussed that it was advisable to endeavor to consolidate said bank with one or more other national banks in the City of Rockford, in order to prevent the open insolvency of said bank, but states the fact to be that a contemplated merger of two other national banks in Rockford was discussed; that this defendant stated at said meeting and stated to L. B. Achor, the Receiver herein, who was then Vice-President of this bank and had been for a number of months last past, that this bank was solvent and asked him, said Achor, who had previously been a national bank examiner: "Why do we have to merge"; and that said Achor said in reply: "We dont," and further, "Sure we are solvent".

Further answering this defendant admits that before said meeting broke up at noon, said Directors passed a Resolution giving authority to said examiner to discuss the affairs of this bank with any other bank in said City of Rockford with a view towards consolidating or merger; that said Resolution was passed because said examiner insisted that due to the above contemplated merger of said other banks, there might be a run on all the Rockford banks and if so, this bank as merged would be further able to stand said run; but denies that it was then and there stated that in the situa-

tion which then existed in Rockford and was likely to exist within the next few days, that it would be impossible for said bank to continue to function as a national bank unless the relief discussed was afforded said bank; and denies that
33 this defendant at said meeting heard all of said discussion that took place at said meeting, as alleged in the bill of complaint herein, in said paragraph 3, either personally or while acting as President of said Mechanics Universal Joint Company.

Further answering this defendant stated that after said Resolution was passed, a Committee was appointed by said Directors to meet with some other bank in reference to a possible merger and to go over the situation and work out plans; that in the meantime, said The Manufacturers National Bank and Trust Company of Rockford, Illinois, continued to operate as usual as a bank; that said Committee met late the next day, June 13, 1931, and discussed a possible merger with The Third National Bank of Rockford, Illinois; that nothing definite could be accomplished on said June 13, 1931 and said meeting was adjourned to Sunday, June 14, 1931; that finally a proposition was submitted by said Third National Bank, which was totally inacceptable to said Committee and Directors of said Manufacturers National Bank; that thereupon, said Directors of said Manufacturers National Bank called another meeting on said June 14, 1931, at which was present, a national bank examiner, who then and there notified said Directors that since they had not effected a merger or consolidated, that they should not open and operate said bank on the coming Monday morning, June 15, 1931, or at any other time; that said Directors remonstrated violently, stating and insisting that said Manufacturers National Bank was solvent, should remain open and function as a separate bank, or might eventually consolidate and that in any event, all of its depositors and creditors could and would be paid in full in the usual course of business; that in spite of said remonstrance, said examiner finally stated that if said
34 Directors opened said bank on said Monday morning, he would hold each and every one civilly and criminally liable for any deposit accepted on Monday or any day thereafter, for in his opinion, said bank was insolvent.

Further answering this defendant states that until late on said Sunday night, June 14, 1931, he did not know that said bank would suspend its operations and be closed on said Monday morning, June 15, 1931, or at any other time or that it was contemplated that said bank would suspend and be

closed on said date or at any other time; that until said meeting on said June 14, 1931, and conference with said bank examiner, this defendant understood and believed that said bank would continue to remain open and function as a bank or function as a merged bank in the future and that in either event, all of its depositors and creditors would be paid on demand in full.

Further, answering, this defendant deniew that he left said meeting of June 12, 1931, at about 12 o'clock noon and immediately thereafter, upon the knowledge and information which he had gained at said meeting, caused a check on the funds of said Mechanics Universal Joint Company in the sum of $42,761.12 to be withdrawn from said bank by a check, but in this connection, this defendant admits that he left said meeting at about 12 o'clock on said June 12, 1931, and in the usual course of business caused said check of $42,761.12 to be drawn and said money deposited in said Third National Bank; that when said check was drawn, there remained a balance on hand in said Manufacturers National Bank on said June 15, 1931 and subsequent thereto of $20,034.12 belonging to said Mechanics Universal Joint Company; that said Joint Company at said time and for a long time prior thereto had large sums of money on deposit in the Rockford National Bank, Security National Bank and Third National Bank of Rockford, in addition to said Manufacturers National Bank; that it was the policy of said Borg-Warner Corporation to keep the money of said Joint Company more or less equally distributed among all of said four above national banks; that prior to said June 12, 1931, there was on deposit in said Third National Bank, a balance of $3,638.71 until said check of $42,761.12 was therein deposited; that prior to said June 12, 1931, there was on deposit in the Rockford National Bank, a balance of $10,834.71; that prior to said June 12, 1931, there was on deposit in the Security National Bank, the sum of $100,033.55; and that on said June 12, 1931, said Joint Company caused a check of $35,000.00 to be drawn on said Security National Bank account to be deposited in said Rockford National Bank to more or less equalize deposits and caused other checks to be drawn on said Security National Bank, bringing the balance down to $50,400.55 on said June 12, 1931.

Further answering, this defendant states that said check for $42,761.12 was withdrawn in the usual course of business; that said check was deposited in the United States mail at

Rockford in the afternoon of June 12, 1931, and received at said Third National Bank on the morning of said June 13, 1931 and duly cleared said morning, and that, if this defendant had had any idea that said Manufacturers National Bank was insolvent and about to be closed, he would have caused said check to have been delivered in person and deposited to said Third National Bank before said bank closed on said June 12, 1931, at its usual hour of 3:00 P. M.

Further answering, this defendant states that on said Jun 12th and subsequent thereto until said Manufacturers National Bank closed, he had on deposi personally in said bank, a large checking accoun and savings account, which he made no effort to transfer at that time or any other
36 time, believing that said bank was solvent and was not going to close, as alleged in the bill of complaint herein.

4.

This defendant answering paragraph 4 of said bill denies that he transferred or caused to be transferred, said sum of $42,651.12 under information which he had acquired in a confidential relation with said Manufacturers National Bank and denies that it was made in contemplation of insolvency of said bank and denies that it was made with a view to prevent the application of the assets of said bank in the manner prescribed by the laws of the United States with reference to national banks and the distribution of their assets upon insolvency and with a view to the preference of said Mechanics Universal Joint Company and to the other creditors of said bank, and denies that said transfer of said funds was made in violation of the laws of the United State with reference to national banks and the distribution of their assets upon insolvency. This defendant alleges and states the fact to be that said Manufacturers National Bank at the time of said transfer on said June 12, 1931, was a going business or concern, was carrying on its business as usual, had committed no act of insolvency and that a present suspension of business was then not contemplated; that this defendant caused said money to be drawn out in good faith and without intent to secure a preference for said Joint Company and without intent to secure payment to said Joint Company to the exclusion of other crediors.

5.

Further answering this defendant admits that no other persons are interested in the matters in controversy, mentioned in the bill of complaint herein, other than the plaintiff and said defendants, but this defendant denies that
37 he is interested in any of said matters and avers that he is improperly enjoined as a party defendant herein.

6.

Further answering this defendant denies that the plaintiff is entitled to the relief prayed for in said bill or any relief whatsoever.

Further answering, this defendant moves the Court to dismiss the bill of complaint herein as to him for the following reasons and points of law arising and appearing upon the face of said bill, to-wit:

There is an improper joinder of defendants in this cause.

The bill on its face is insufficient to constitute a valid cause of action in equity against this defendant. Said bill on its face does not allege or show that said Manufacturers National Bank and Trust Company had committed any act of insolvency on or prior to said June 12, 1931 or contemplated the commission of any act of insolvency.

Said bill on its face does not show that a present suspension of business was contemplated on said June 12, 1931.

Said bill on its face shows that said bank was a going concern on said June 12, 1931, and was carrying on its business as usual and had not committed any act of insolvency.

The allegations set up in said bill do not purport to show the unlawful payment of said sum of $42,761.12.

The allegations in said bill do not purport to show that this defendant personally did anything in connection with the withdrawal of said sum of money which it was not his right to do in the performance of his duties as President of
38 said Mechanics Universal Joint Company.

Wherefore, this defendant prays that said bill of complaint be dismissed as against him.

ERIC S. EKSTROM,
By JOHN EARLY.

EARLY & EARLY,
Solicitors for said Defendant.
By JOHN EARLY.

39 And on, to wit, the Fifteenth day of February, 1932 came the Mechanics Universal Joint Co. by its attorneys and filed in the Clerk's office of said Court at Freeport a certain Amended Counterclaim in words and figures following, to wit: Filed F... 1932.

40 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

AMENDED COUNTERCLAIM OF THE MECHANICS UNIVERSAL JOINT COMPANY.

Now Comes Mechanics Universal Joint Co., a corporation, one of the defendants herein, and, pursuant to leave of Court first had obtained, files this, its amended counterclaim to the claim of the plaintiff filed in this cause:

Amended Counterclaim.

And the Mechanics Universal Joint Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in Rockford, in the State of Illinois, and in this District, by way of a cross-bill herein against the plaintiff above mentioned, and also by way of counterclaim and further answer, avert as follows:

I.

That continuously from the first day of January 1931, down to and including the thirteenth day of June, The Manufacturers National Bank and Trust Company, of Rock-
41 ford, Ill. was a national banking corporation organized and existing under and by virtue of the laws of the United States, and that during said period it maintained a banking house in the city of Rockford, in the state of Illinois, in said District, and in said banking house conducted a banking business and during the whole of said period kept its bank open continuously during banking days and banking hours and by such action represented to the public that it was a solvent, going banking institution and a safe place in which to deposit money; that during the whole of said period said bank was, in fact, insolvent.

II.

That the Mechanics Universal Joint Company, a corporation, as aforesaid, relying upon the representations so made by the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, in keeping its Bank open and doing business and relying upon the representation thereby made that said Bank was solvent and then and there believing that said bank was solvent, made deposits of its money and of its checks and bill of exchange in said Bank during said months of May and June, 1931, as follows;

Date	Deposits
May 6th	$ 167.19
May 9th	28,021.33
May 15th	24,911.68
May 18th	25,000.00
May 23rd	534.35
May 25th	4,163.00
May 28th	2,928.61
May 29th	10,149.61
May 30th	284.44
June 1st	10,095.28
June 6th	44,617.21

And all of which said deposits were received by the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, as deposits of cash and at a time when it was knowingly insolvent, and the account of said Mechanics Universal Joint Company was credited on the books of said Bank to the credit of said Mechanics Universal Joint Company; all of which said deposits so solicited and received by said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, under the circumstances aforesaid, and when said Bank was knowingly insolvent, constituted a fraud upon said Mechanics Universal Joint Company, said corporation, and that by reason of said fraud so perpetrated by said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, upon said Mechanics Universal Joint Company, the title to said sums of money so represented by said deposits never passed to said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, but in law remained in the Mechanics Universal Joint Company, and the same was received by said L. B. Achor, said Receiver of said Bank, as a trust fund which in equity belongs to, and is the property of, this defendant; and that there re-

mained in said The Manufacturers National Bank and Trust Company of Rockford, Illinois, on the fifteenth day of June, 1931, at the time the said Receiver was appointed, credited to the account of this defendant, the sum of Twenty Thousand, thirty-four dollars and twelve cents ($20,034.12), all of which had been deposited when said Bank was knowingly insolvent and which, in equity and good conscience, by reason of the circumstances under which said deposits were made, belongs to, and is the property of, this defendant and should be paid to this defendant before the assets of said Bank in the hands of said Receiver are distributed to the general creditors of said Bank.

III.

That at the time of the closing of said bank and at the
43 time the assets therefor were received by the Receiver herein, there was as assets of said Bank so received by said Receiver the sum of towit: Four hundred thousand dollars ($400,000.00) in cash, which said cash included the said sum of Twenty thousand, thirty-four dollars and twelve cents ($20,034.12) so deposited by said defendant under the circumstances in this counterclaim hereinabove enumerated.

Wherefore, the Mechanics Universal Joint Company aforesaid, prays that an accounting may be taken in this behalf and that in and by such accounting it be determined what funds and moneys and property of the Mechanics Universal Joint Company were deposited by said Mechanics Universal Joint Company in the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, at the time or times when said Bank was knowingly insolvent and when said Bank was holding itself out to the public as a solvent, going institution by keeping its banking house open for the conduct of a banking business and for the reception of deposits, and that a decree may be entered herein against the said plaintiff, L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company, of Rockford, Illinois, ordering and directing him, out of the funds and assets in his hands and such Receiver, to pay to the Mechanics Universal Joint Company such sum of Twenty thousand, thirty-four dollars and twelve cents ($20,034.12), together with legal interest thereon from the date of deposit of the same, before making distribution of any of the assets of the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, to the general creditors thereof; and that this defendant may have such

other and further relief in the premises as equity may require and to your Honor shall seem meet.

44 Wherefore, this defendant prays that the said bill of complaint be dismissed as against it, and that it be awarded such relief as it may be entitled to under and by virtue of said cross bill and counterclaim.

MECHANICS UNIVERSAL JOINT COMPANY,
By SHELBY L. LARGE,
Its Attorney.

LARGE & RENO,
KENWORTHY, SHALLBERG & HARPER,
Moline, Ill.,
Attorneys for Said Defendant.

45 And afterwards, to wit, on the Nineteenth day of April 1930 being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward District Judge appears the following entry, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

ORDER.

On this day this cause coming on to be heard on motion of the plaintiff by his attorney that the said cause be set for trial on a day certain, and both sides of the case being present by counsel, and the Court having heard the motion and arguments of counsel, It Is Ordered by the Court that this cause be, and it is hereby set down for hearing on the 25th day of April A. D. 1933. Enter.

CHARLES E. WOODWARD,
Judge.

65 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

CONDENSED NARRATIVE STATEMENT OF EVIDENCE.

Loged in the Office of the Clerk of this Court on September 18, 1934.

CHARLES M. BATES,
Clerk.

66-68 • • (Index) • •

69 CONDENSED STATEMENT OF EVIDENCE.

ERIC S. EKSTROM, a witness for the plaintiff, in answer to interrogatories propounded to him by Mr. Roy F. Hall, testified:

My name is Eric S. Ekstrom. I reside in Rockford, Illinois and am President of the Mechanics Universal Joint Company, and several other companies. Have been president of the Mechanics Universal Joint Company since 1916 although that was not the name of the Company at that time. I was acting as president of Mechanics Universal Joint Company on the 12th day of June, 1931 and on that date I was also a Director of the Manufacturers National Bank and Trust Company, of Rockford, Illinois. Had been director of said Bank for approximately 3 or 4 years and for something over a year or two had been a member of the loan committee of the Board of Directors of said Bank. As president of the Mechanics Universal Joint Company I performed the duties usually pertaining to presidents of a corporation. The office of the Manufacturers National Bank and Trust Company was about
70 a mile and a half away from the office of the Mechanics Universal Joint Company. The Mechanics Universal Joint Company engaged in the manufacture of automobile parts.

I was also president of the Rockford Drop Forge Company and also of Forgings and Stampings, Inc. Their places of business were in Rockford and at this time they had bank accounts in the Manufacturers National Bank & Trust Company. I was acting as director of the Manufacturers National Bank & Trust Company on January 13, 1931 and at a meeting held on that day I was made chairman of the meeting of directors and I acted as such. At that meeting a loan committee was appointed by the chairman of the Board of Directors; not by me.

I know of a Rolling Green project. This was a real estate venture where land was purchased and divided into town lots and a subdivision platted and improvements were made. I was one of the partners in that project. Mr. Hugo Olson, also a director and Vice President of the Manufacturers National Bank & Trust Company, and Mr. A. R. Floberg were other partners in the Rolling Green project. The Rolling Green borrowed $30,000 from the Manufacturers National

Bank & Trust Company. I can't recall whether that was the total of their borrowings or not but that has not been paid.

Exhibit 22 which you hand to me is a report which was presented to a directors' meeting of the bank on January 13, 1931. Exhibit 22 is a copy of the bank examiner's report which was forwarded to the bank by the Comptroller of the Currency and covers an examination of the bank up to December 1, 1930. I was familiar with the contents of this report. There came with this report a letter from the
71 Comptroller of the Currency dated January 8, 1931. I saw that letter at that time. There is a summary at the close of this report which states that of the bank loans and discounts there was $1,014,167.09 of slow assets. I understood that was the amount which the Department considered slow. I also understood that the Department estimated that there were doubtful assets of the bank and of the loans and discounts of the bank of $228,173.34, and I understood from this report that the Department estimated that there were slow loans of $138,789.96 since the last examination. A letter was written and shown to every director in answer to the Comptroller's letter. I think likely I signed this letter as a director of the bank.

On February 24, 1931, I was present at a directors' meeting at that bank. A carbon copy of a letter addressed to the Comptroller of the Currency, known in this Record as Plaintiff's Exhibit 23, is a copy of the letter that was discussed at that meeting and forwarded to the Comptroller of the Currency, and signed by me. I knew at that time that the ordinary practice of the Department was to examine National banks once every six months and I also knew that the Manufacturers National Bank was on what they call the special list, for special examinations every ninety days. And our bank had been requested by the Comptroller to report to him by letter every thirty or sixty days, I don't recall which. Any of these letters that were presented to me, I signed. I understood that the bank was placed on the special list because some of the items were slow and some doubtful. It was my opinion that the Department requested the letter from the Directors because they wanted the Directors to be familiar with the situation.

72 I was not one of the incorporators of the Winnebago Securities Corporation. I know of that company. I heard of it in the bank examiner's office in Chicago some time in November or December, 1930. I understood at that time that there were some assets in the bank totaling about

$400,000.00 that the Comptroller refused to allow the Bank to carry even as doubtful assets. And I knew the Winnebago Securities Corporation was incorporated for the purpose of getting from the directors certain sums of money to be paid into the bank and to give its note for other sums to take out the notes that the Comptroller refused to allow the bank to carry any longer as assets of the Bank. As a director I contributed to the Winnebago Securities Corporation five or six thousand dollars. Don't recall the exact amount. I knew that money was to be used to take up these assets that the Comptroller would not allow the bank to carry as assets. It was my understanding when I was in the bank examiner's office in Chicago that there was to be paid in $150,000.00 in cash. I understood that the Thompson family were to pay $50,000 in cash. If they put in a note at that time I did not know it. It is my understanding that the Winnebago Securities Corporation was to put its notes in the bank and secure these notes by collateral consisting of notes that the Comptroller required to be taken out of the Bank. I did not ascertain whether any of that collateral had been paid by the bank up to the time of its suspension. So far as I know the Winnebago Securities Corporation does not own or possess any property other than the notes that they got from the Manufacturers National Bank. When I paid five or six thousand dollars to the Winnebago Securities Corporation, I have no recollection whether I got any stock or other evidence of payment. There were other directors present in the office
73 of the Chief Examiner in Chicago when I was there in December. As many as I can recall there was Oscar Milburn, Hugo Olson, A. R. Floberg; I am not positive but I think H. A. Taylor and others who were not directors were Ralph Thompson, Norman F. Thompson, Jr. (the latter two were the sons of Norman F. Thompson, Sr. who had been a director and stockholder of the bank for many years and for many years its president). A. R. Floberg at that time was president of the bank and Hugo Olson was Vice President. The only information I had as to whether or not any of the notes which the Winnebago Securities Company had received from the bank and had pledged to the bank as collateral and had been paid was conversations which I had with Mr. Achor or Mr. Floberg or any one in the bank—just casual conversations as to just how those collateral notes were being paid. Along in February, 1931, Mr. Achor was employed by the bank and a part of his business was to try and collect some

of these Winnebago Securities items. We requested a recommendation from the Comptroller of the Currency and he recommended Mr. Achor to us. Achor was employed by the directors of the bank and had nothing to do with the Comptroller of the Currency or the Examiner and was to perform the usual duties of an officer of the Manufacturers National Bank. He had no stock that I know of. He was made Vice President. It is not a fact that we employed him for the purpose of attempting to realize on doubtful assets. I don't know whether he spent most of his time at that or not. In a general way he reported to the Board of Directors with reference to activities of his in attempting to collect doubtful assets. After Mr. Achor was employed and before the suspension of the bank, he talked to me about payment of my obligations
74 and other officers did also. I can't recall whether he talked to me once or more times. At the time the bank examiner made the examination of December 1, 1930, it was customary for him before he left Rockford to call the Board of Directors of the Bank together. I can't recall whether I attended that meeting or not. I remember a Mr. French who made that examination called the directors together and discussed with them the loans he listed as slow and doubtful. He might have said that those were so slow and doubtful that they must be taken care of by the bank immediately. I don't recall the amount that he stated at the time. Whatever is shown in the report I would be willing to take as the amount that the examiner thought was slow and doubtful.

The next examination of the bank was on or about April 27, 1931, and that was conducted by Mr. Baty. A copy of his report to the Comptroller was sent back to the Bank and I saw it and I think I saw the letter of the Comptroller that came with it. Exhibit 24 which you hand me is the letter from the Comptroller accompanying that report and Exhibit 25 is the copy of the report sent to the bank by the Comptroller. The letter is dated May 29, 1931 and consists of two pages. I could not say I saw this report. The letter was probably received about the first day of June and I do not remember that we had a June meeting of the Board of Directors. I believe I saw the letter. I don't recall whether the report was examined by the Directors. Apparently by this report the Department claims that there was $1,112,341.14 of slow paper among the loans and discounts of the bank. I do not know whether I saw that report prior to the closing of the bank or not. The letter which you hand me written to the Comptroller of the

Currency is dated June 9, 1931. I cannot say definitely
75 whether I, as a director, signed this letter or not because I attended a funeral in St. Louis, Missouri, on June 10, and I left Rockford early on June 9 and if this letter had been brought to me on the morning of June 9, I would have signed it but I do not now recall having signed or read this letter. I do know that within about thirty days of an examination there was usually sent to the bank a copy of the examiner's report; and that these reports were required to be kept at the bank and on file in the bank. Some time between May 29 and June 9, I recall that the Comptroller was claiming that there was approximately $226,765.38 worth of doubtful paper in the bank.

Q. And do you know that the Comptroller was claiming at that time that the slow assets of the bank were $1,145,201.15, or substantially that?

Mr. Kenworthy: I desire to interpose an objection to all the questions that call for the knowledge of this witness as to the claims of the Comptroller as to the character of the assets.

The Court: Overruled.

Mr. Kenworthy: Could that objection be noted without being specific as to each question concerning that subject?

The Court: The record may show that the objection stands to each of the questions of the witness concerning the claims of the Auditor as to the valuation or character of the assets. Let the ruling show that the objection is overruled as to each question.

Defendants except.

A. If I had the opportunity of reading that report I would know the Comptroller claimed those were slow assets. I also know that the Comptroller claimed that there had been losses to the amount of $197,795.50. I also know that the Comp-
76 troller claimed that 31% of the total loans and discounts of that bank were to directors and their concerns in which they were directors.

At page 198 of the Transcript of the Evidence it appears that Mr. Hall, attorney for the plaintiff, offered PLAINTIFF'S EXHIBITS 22, 23, 24 and 25.

Mr. Kenworthy: The defendant, the Mechanics Universal Joint Company, objects to so much of Exhibits 22 and 23 as purport to show the Comptroller's or Examiner's opinion as to the valuation and character of the assets of the Manufacturers National Bank & Trust Company; also to so much of the letter dated January 8 from the Deputy Comptroller to the Board of Directors of the Manufacturers National Bank

which expresses the opinion of the Comptroller as to the valuation or condition of the assets.

Mr. Early: I desire the same objection to apply to the defendant Eric S. Ekstrom.

Objections overruled. Defendants except.

ERIC S. EKSTROM, on cross-examination, in answer to interrogatories propounded to him by Mr. Kenworthy, attorney for defendant, Mechanics Universal Joint Company, testified as follows:

I have been asked concerning some negotiations that were had in the bank examiner's office in Chicago between the directors of the Manufacturers National Bank and the Bank examiner relative to notes that were taken over by the Winnebago Securities Company. That conversation was some time in November, 1930. I first heard of the plan to organize the Winnebago Securities Corporation to take these assets out of the bank from the Chief Examiner in Chicago. He suggested it. He suggested that in the event the Company was organized and the plan carried out it would greatly improve the
77 condition of the bank. That if this was done the Bank could continue operations. He said that the bank would be in a fairly good condition if that plan was carried out and that the condition of the bank would be satisfactory to the Department. I understood that his plan was for the Winnebago Securities Company to pay certain money into the bank and give its note for the difference between the amount of money it paid and the securities taken out by it. It was my understanding that the Winnebago Securities Company had paid in $150,000 of money to the bank. At the time of this meeting with the Chief Examiner at Chicago in November, 1930, Mr. A. R. Floberg, the President, and Hugo Olson, the Vice President, and I think H. A. Taylor, the Vice President and Trust Officer of the Manufacturers National Bank and Trust Company were present. The Ralph Thompson and Norman F. Thompson whom I have mentioned were not officers or directors of the Bank. We were in the bank examiner's office several times before the deal was finally consummated, but I think the first meeting was in November, 1930.

E. E. THAYER, a witness called on behalf of plaintiff, in answer to interogatories propounded to him by Mr. Roy F. Hall, testified as follows:

I live in Rockford, Illinois, and am Cashier of the Third National Bank of Rockford. Have been such for about two years. I was acting as such Cashier on June 12 and 13, 1931. I have brought the records of the bank with me. I have the account of the Mechanics Universal Joint Company with the Bank. The paper that is marked "Plaintiff's Exhibit 1" is the original record of the bank of that account. So far as I know it is shown correctly. This is the original ledger sheet.

This is where all of the credits are placed. There are
78 debits on one side and the various dates of credits and debits showing the true history of the deposits and withdrawals. This sheet begins April 14, 1931 and it ends July 13, 1931. On the extreme left of Exhibit 1 is a column entitled "Proof". The figures under this column are the carry over of the old balances and this is the new balance. It means for instance that on April 17, before anything was done, there was a balance of the amount of money shown under "Proof". At the extreme right is a column entitled "New Balance". Under this column are shown the balances during the course of business. If there is only one opposite a day's transactions it defines the balance at the close of business on that date. In other words, the left hand side under "Proof" is what the balance was before any transactions and the other side under "New Balance" the balance after the transactions. That is true of both sides of the sheet. The dates shown are the dates of the various transactions. Under the column "Checks in Detail" are shown the details of the checks that made up the transaction. Under the heading "Date of Deposit" that means that the figures under that column show the date that the deposit went on the ledger sheet, the day the deposit was made and the amount of the deposit. As far as I know all the figures on here are true and correct. Referring to the date of June 13, I also have a deposit ticket which is numbered "Plaintiff's Exhibit 2". This is the original deposit ticket. The deposit ticket states on its face "Check $42761.12". I do not know from looking at that how that deposit came to the bank. I could tell that the deposit was by check. There is nothing on the deposit slip that informs me on whom the check was drawn. I have no records of the bank here that

will disclose that. There was at the time in Rockford a
79 Clearing House where our bank cleared checks on other banks in Rockford. Our bank kept a record of its transactions with the Clearing House. I do not have the list of clearings with me but I will produce it later. I do not know the individual employee of our bank who received the deposit slip, "Exhibit 2". The number of the Department that received the slip was Number 4. That was the receiving teller. There is no way by which I could show when that check arrived at our bank or how it arrived there. Department No. 4 received deposits that came through the mail as well as deposits at the window. I think I recognize the handwriting on deposit slip "Exhibit 2" and I would say it was in the handwriting of W. H. Stark, an employee of Mechanics Universal Joint Company. While I have never seen him write, I am familiar with his handwriting. His signature card is on file in our bank. I have one in my pocket—an old card. This deposit slip is all in handwriting—not typing. I think the man in charge of our Department No. 4 on June 12 1931 was Valdemar Jansen, but I am not positive. It appears from Plaintiff's Exhibit 1 that the deposit under date of June 13, 1931 was for $42,761.12. It means that on the thirteenth day of June, 1931, there was deposited in the bank to the credit of Mechanics Universal Joint Company, of Rockford, Illinois, $42,761.12, and from my knowledge of the bank I would say that the deposit slip, Plaintiff's Exhibit 2, dated 6-12-31, refers to the same amount as the deposit of $42,761.12 shown under date of June 13, in Exhibit 1. I believe clearings were made through the Clearing House in Rockford at that time in the morning at 9:30 or 10:00 o'clock. So that these records would indicate to me that in the course of our business that the check was received on the morning of the thirteenth and placed in the clearings of that day.

PLAINTIFF'S EXHIBITS 1 and 2 offered in evidence.
PLAINTIFF'S EXHIBIT 1 admitted as to all entries on and prior to June 13. Objection sustained as to balance.
80 PLAINTIFF'S EXHIBIT 2 admitted.

I have with me now the payroll accounts of the Mechanics Universal Joint Company and also a deposit slip dated June 12, 1931, showing a deposit of $1390.92. I produce both of them. Exhibit 8 is a deposit slip dated 6-12-31. That is an original record of our bank. It is a deposit to the credit of Mechanics Universal Joint Company. On Plaintiff's Exhibit 1 there appears to be two deposits on June 13—one of

them for $42,761.12, on June 13, and there was also a deposit of $1390.92. It means that there were two deposits on that day and the deposit slip, Plaintiff's Exhibit 8, refers to the entry on Plaintiff's Exhibit 1 under that date of $1390.92. It shows that there were two separate and distinct deposits on that day, June 13, 1931, one of $42,761.12 and one of $1390.92. The credit would be entered on Plaintiff's Exhibit 1 from the deposit slips, Plaintiff's Exhibits 2 and 8.

The payroll account of the Mechanics Universal Joint Company with our bank is marked Plaintiff's Exhibit 9 and 9-a. This is a separate account called the Mechanics Universal Joint Company payroll account and is from April 23, 1931 to July 16, 1931. This is an account used for their pay checks. All pay checks paid by our bank were entered against that account. The account shown by Plaintiff's Exhibit 1 is the general ledger account of the Mechanics Universal Joint Company and had nothing to do with the pay roll account. All deposits to the pay roll account were made up from a deposit slip directing the bank to deposit to that account and when payroll checks were paid they were charged against that account. This is a separate and distinct account from the general account represented by Plaintiff's Exhibit 1. Ex-
81 hibits 9 and 9-a are records of the Third National Bank of Rockford, Illinois. They are kept under my general direction and are true and correct to the best of my knowledge. The books of our bank were in balance on June 13, 1931. I produce a paper that is marked Plaintiff's Exhibit 10, showing the correct balances of the bank on that day. Exhibit 10 is a copy I made from the original book. As shown by Exhibit 8 the deposits to the payroll account on that day consisted of checks drawn on some other bank in Rockford, totaling $656.34, checks drawn on some bank outside of Rockford, totaling $537.55, and checks on our bank, totaling $191.03, and Post Office Orders, totaling $6.00. A total of all of these represents the total of this deposit.

PLAINTIFF'S EXHIBITS 8, 9, 9-a, 10 and 11 offered in evidence and objected to by counsel for the defendant, which objections were overruled by the Court and exception duly note.

Plaintiff offers PLAINTIFF'S EXHIBITS 1 and 2. Plaintiff's Exhibit 1 is objected to as to all entries on it with the exception of June 13, 1931.

The Court: Objection sustained. The first half up to June 13, objection overruled, last half, objection sustained.

The witness E. E. THAYER, being cross-examined by S. R. Kenworthy, attorney for defendant Mechanics Universal Joint Company, testified on cross-examination as follows:

None of the entries made on Exhibit 1 were made by me and the conclusions that I have drawn from examining Exhibit 1 and Exhibit 2 as to when this check came into the bank and the manner in which it came in are based upon the correctness of Exhibits 1 and 2, neither of which I saw at the date any of these entries were made.

82 *Redirect Examination of Witness, E. E. Thayer.*

As cashier of the bank, I had charge of the routine of the institution, looking over, overseeing the various departments, handling the mail and various other things. The bookkeeping department comes under my supervision in a way. From time to time I look at the accounts of customers and have them audited. I could not state what particular person made the entries shown on Exhibit 1. From time to time I have had this account audited with others and so far as I know there has never been any error in this account. If there were errors, the auditor should find them. There is a custom in the bank of making up a daily balance sheet which tends to show whether the bank books are at balance. The daily balance sheet is a constructive statement of the whole institution. If our books balance, they are correct.

H. A. CONKLIN, a witness for the plaintiff, examined by Mr. Hall, testified as follows:

I live in Rockford and was employed as Cashier by the Manufacturers National Bank and Trust Company. Had been such since January 29 and was so acting on June 13. I took care of the mail and had charge of the help, looked after the payroll, attended the customers as they came in. The bookkeeping of the customers accounts was partly under my direction. The bookkeeping department had charge of that. Mr. Kramer was the head of that. He worked under me. The bank had a system of making up a sheet of figures at the close of each day to ascertain whether or not the bank's

books were in balance. Plaintiff's Exhibit 3 which
83 you hand me appears to be the account of the Manufacturers National Bank and Trust Company with the Mechanics Universal Joint Company. I believe it is the original ledger sheet of our bank. The last entry thereof, June 13, 1931, of $46,197.03, indicates that a total list of checks of that amount was charged to the account of the Mechanics Universal Joint Company at our bank. Plaintiff's Exhibit 4 which you hand me is the duplicate of the original list that was sent to the Mechanics Universal Joint Company with their return checks when their checks were returned. The stamp on Plaintiff's Exhibit 4 "Payable 6-13-31" was the stamp of the bank. On the list, Plaintiff's Exhibit 4, there appears an item of $42,761.12 which is indicated in the total of the amount charged to the account on that day, Exhibit 4 being the detail that goes to make up the charge of $46,197.03, made against the account on June 13. Plaintiff's Exhibit 5 is a list of the clearings received from the Third National Bank by our bank on June 13, 1931. That is the usual way in which clearings were exchanged, by having a list. It is a list made up by the Third National Bank in their clearing department as a list of checks that they had against our bank to be exchanged through the clearings on June 13. All of these items were checks that they had against that bank on that morning. There is nothing on this list that would indicate the amount of checks our bank had against the Third National Bank to be exchanged that morning. This list shows the total of the checks of the Third National Bank had against the Manufacturers Bank on June 13 was $53,-604.02. The figure $4617.01 which is in red I would presume it was the total of the first run of the items the Third National Bank had on us on that day—in other words, the
84 checks that came in early that day. That is intended to include the total of all the items above it. The item $5,703.27 in red is the continued total including the original total plus other checks that had been added to the list. Then down two-thirds of the way there appears in red in figures $4872.91. That is the total of intervening items between those two titles. The entry $5708.67 and then a figure of $10,851.58 is the total of the two previous totals. Immediately below the figures $10,851.58 appears the figures $42,761.12. In my opinion this last figure indicates the same item as the figure $42,-761.12 mentioned in the Plaintiff's Exhibit 4. I believe Plaintiff's Exhibit 3 is a true and correct statement of the account. In a number of places there appears the word "LS". This means that the amount represents the total of a list of checks.

Witness CONKLIN, cross-examined by Mr. Kenworthy, testified as follows:

The paper marked Plaintiff's Exhibit 3 is a ledger account between the Manufacturers National Bank and the Mechanics Universal Joint Company covering a period of time from April 16, through to June 13, 1931. And Plaintiff's Exhibit 4 is simply a duplicate of the list of various checks that were returned by the Manufacturers National Bank to the Mechanics Universal Joint Company with the cancelled checks. It is a list of the checks of the itemized statement of checks or list of checks that were paid on June 13, 1931 by the Bank, the checks being drawn by the Mechanics Universal Joint Company. Plaintiff's Exhibit 5 is simply a list of clearings sent to the Manufacturers National Bank by the Third National Bank on June 13, 1931; and the items in red are totals
of items that the Third National Bank received during
85 June 12. I believe the slip was dated June 13, but most
of those items were items that came to the bank on June 12, but were sent through the clearings on the 13. I could not tell what checks came into our bank on the twelfth but if they handle their clearings the same as we do, the items on the bottom of the list are items that came in on the morning of the 13. I refer to the next to the last red figure. I refer to the figure $10,581.58 and in my opinion the items above that figure were items that were received by the Third National Bank on the twelfth.

M. R. BATY, a witness for the plaintiff, testified upon examination by Mr. Hall, as follows:

I reside in Clinton, Iowa and am a National Bank Examiner in the employ of the Comptroller of the Currency. Have been such since September, 1930, and was so employed on June 11, 1931. On the latter date, I went to Rockford, Illinois, at the request of Mr. Floberg, President of the Rockford Clearing House Association, who was also then President of the Manufacturers National Bank and Trust Company. I arrived in Rockford that morning about eight o'clock and Mr. Floberg came to my room at the hotel. Mr. L. B. Achor was with him. After I saw Mr. Floberg, I made a visit to another bank in Rockford, the Security National Bank, and im-

mediately after that I visited the Swedish-American National Bank. There were some negotiations between those two banks which lead to the formation and signing of a contract. I then went back to the Manufacturers National Bank and Trust Company about eleven o'clock in the morning and had a meeting with the directors. I know Eric S. Ekstrom. He was present at that meeting. I also know Hugo Olson, and
86 he was present also. Eric S. Ekstrom and Hugo Olson were both directors of the Manufacturers National Bank and Ekstrom was a member of the Loan Committee of that bank. I examined the bank in April, 1931. The bank was on the so-called special list to be examined every 90 days or oftener. It had been on the special list for two examinations, prior to that I could not say. I made an examination of the bank in April, 1931 and made a report to the Comptroller. I saw a copy of this report that I made to the Comptroller in the bank shortly after it closed on June 13. I am unable to give the exact conversation that took place at the meeting at which Mr. Ekstrom was present on June 12, 1931. It was a detail of my business and I cannot repeat it verbatim but in substance I can.

Q. Will you state to the Court the substance of that conversation held in the presence of Mr. Ekstrom?

Objection by the defendant.

The Court: I think we had better receive the testimony subject to the objection of counsel and if later found immaterial we can strike it.

A. I reported to them the fact that the Security National Bank, because of a continued drain of deposits, felt that it was no longer fair to their depositors to continue and I told them that there had been a contract entered into subject to final appraisal of the assets for a take over of the deposit liability of the Security National Bank by the Swedish-American Bank and I told them that in view of the continued drain of deposits they had had and were still having that it would be for the best interests of the banking situation for their bank to try and arrange some place to take their deposit liabil-
87 ity under cover. I outlined to them the fact that we had four banks on the east side of the river and that if we had two banks on the east side of the river we would be in much better position. There was from various members of the Board comments as to whether they could stand on their own feet. They said they could stand any kind of a run that developed. I pointed out to them their low cash reserve. I said their cash reserve was entirely too low for

the bank to weather any continued drain of the deposits and it was my opinion that they would require far greater cash reserve. That is the substance of our conversation that morning. I advised the Board that I had a contract in my pocket between the Swedish American Bank and the Security Bank. There was nothing else said that I can recollect. There was something said if the Security Bank did not open we would have a very determined run at the Manufacturers National Bank and that whether or not it was taken over there would probably be unrest that morning. I told them that the contract provided for a take over subject to appraisal and if the take over was brought to a successful conclusion it would happen Monday morning, the fifteenth.

Q. Was there anything said in substance by you as to what would happen if the Swedish Bank did not take over the Security as to whether the Security would continue to operate?

A. I do not believe that was discussed. Nothing was said in that conversation as to what bank I would discuss the affairs of the Manufacturers Bank with. I expressed
88 the opinion that the cash position of the Manufacturers bank was such that if a run developed they would not have sufficient cash or cash resources to last very long. This meeting broke up about twelve o'clock. Eric Ekstrom was at this meeting. Whether he was there during the entire time I do not know. I have no recollection of his leaving the conference at any time. It was a small room and quite a few of us were there and most of us were standing. After the meeting I received a letter; have no recollection by whom it was signed; have not the copy with me. It is probably in my files in Clinton, Iowa. After I received this letter, I got in touch with Mr. Spafford, President of the Third National Bank of Rockford and on the night of Saturday, the thirteenth of June, a committee from the Manufacturers bank met. They met in the vault basement of the Manufacturers National Bank on Saturday the thirteenth of June. There were a number of people there. Ekstrom attended that meeting. I don't know the complete list. The meeting started about four o'clock in the afternoon.

Q. On this Saturday when that meeting occurred, when Mr. Ekstrom was there what was said and done?

Objected to on the ground that what took place after the twelfth of June is immaterial.

Overruled. Defendants except.

A. The meeting lasted until seven o'clock the next morning. Ekstrom was in and out. At that time a committee from

the Board of Directors of the Manufacturers National Bank and a committe from the Board of Directors of the Third National Bank made an appraisal of the assets of the Manufacturers National Bank for the purpose of arriving at a basis for a take over. I could not tell you whether Ekstrom was present when the meeting broke up or not.

89 Q. What, if anything, was said during that meeting in the presence of Ekstrom that you recall, if anything?

Objected to on the ground that same is immaterial as to what occurred after the twelfth of June.

The Court: I think I will admit it subject to the objection.

Exception.

A. The assets of the bank were appraised by two committees in which they set up the assets that the Third would take and would not take.

The assets were marked on that basis. The appraisal was finished about seven o'clock in the morning. Who was present at that time I could not say. During the night everybody that appeared on the committee were in and out. I could not say if Ekstrom was on the committee or not. After the assets had been valued, a statement was made to the Board by me of the amount of money that the Third National Bank would require. That is, the Board of Directors of the Third National Bank advised me how much they would require. Afterwards I talked with the Directors of the Manufacturers Bank. Could not say whether Ekstrom was present or not. This last conversation between me and the Directors of the Manufacturers was Sunday afternoon. The hour I could not say. There was a meeting of the Board of Directors of the Manufacturers on that Sunday afternoon about seven P. M. Ekstrom was present then. A chief National Bank Examiner of this District, Mr. Alfred E. Leyburn, was present on that Sunday night meeting. I was present at that meeting of the Board of Directors when the resolution was passed. Ekstrom was also present.

Q. At that meeting of the Board of Directors when Ekstrom was present what, if anything, was said about the amount of money it was necessary to be raised for the

90 Third National to take over that amount of liability?

Mr. Kenworthy: Objected to.

The Court: He may answer.

Exception.

A. It was admitted and stated by all the directors present the amount involved could not be raised. The amount talked of was $750,000. The resolution I spoke of was passed about

eight o'clock in the evening of Sunday, the fourteenth of June. From the time the doors of that bank closed at the close of business on Saturday, the thirteenth of June, they have never been opened since for the transaction of business. Some one present at that meeting asked whether they could open the bank on Monday morning. They were told that that was their duty but in view of the low cash of the bank it would not be advisable. The resolution appearing under the title of a special meeting held June 12, 1931—at 11 A. M. is the resolution that was passed before I went to talk to Spafford of the Third National Bank. The letter which you hand me, marked Plaintiff's Exhibit 6, was the resolution passed and signed by the Board that night. The signature of Eric S. Ekstrom is his signature. The sheet of paper which you hand me marked Plaintiff's Exhibit 7 is the page I examined from what I testified heretofore. On Monday, June 15, 1931, I listed the assets and liabilities of the Manufacturers National Bank and Trust Company. I made up a list of the assets of the bank to be signed by the Receiver, listing the liabilities also.

Q. At the time when you talked to the directors on June 12, about eleven o'clock, did you then know the financial condition of the Manufacturers National Bank and Trust Company?

Objected to as immaterial.

The Court: He may answer subject to objection.

A. I did.

Q. What is the fact as to whether or not any of their assets were pledged as collateral to loans?

Defendants object as immaterial. Overruled. Exception.

91 A. Yes. I told them they could not raise any more cash on their assets. When I stated that, it was true. They had pledged their assets, as collateral to loans. I don't remember where. I mean they had borrowed against their assets.

Q. With reference to that subject, state what other conversations did you have and what did you say about having borrowed money and pledged their assets?

Defendants object as immaterial.

The Court: It may go in, subject to the objection.

Exception.

A. I cannot recall any of the details of the conversation. The substance of it was that their cash position was extremely low and assets had been pledged and they were not

in a position to stand a protracted run. The entire substance of the conversation was the fact that their cash position was low; their assets were pledged; they were suffering from a slow drain. I said that to them. In substance I have told you all that I can.

Q. I want to ask you if there was anything said at that time to those directors by you in case the Security Bank did not open on Monday morning?

Objection. Overruled. Exception.

A. The general discussion was whether or not they could stand a run, whether or not the Security opened or was taken over. I told them that without a question of a doubt there would be a run and that they would have to be fortified against a run and that if the Bank did not get taken over the run would still be there.

Motion by defendants to strike out answer as not responsive. Overruled. Exception.

I can't remember anything else.

Q. Do you know what was the financial condition of the bank on June 11 to which you refer?

92 Defendants object as immaterial and irrelevant and not the best evidence and calling for the opinion and conclusion of the witness. Overruled. Exception.

A. I did know the condition of the bank.

Q. State what it was.

The defendants make the same objection.

Q. Had there been anything done before that time with reference to the assets of the bank? If so, tell what it was.

Objected to as immaterial and irrelevant.

The Court: Overruled.

A. The first examination I made of the Bank was in April.

Q. And when you examined it, what did you find from the bank's records?

Defendants object for the same reasons heretofore stated. Overruled. Exception.

A. I found from the bank's records the organization of the Winnebago Securities Company. The Securities Company was organized. $150,000 was paid in cash and they executed a series of notes of approximately $300,000 which were to be collateraled by the objectionable assets that the Comptroller had asked to be removed. $100,000 was paid in December or January to the Bank in cash for which the Bank delivered to the Securities Corporation assets of a like amount. In June the remaining $50,000 was paid in and a like amount of assets delivered. The securities that were

objectionable assets were given to the Winnebago Securities Company. They in turn executed their notes payable to the bank collateraled by these assets. It made a total re-
93 moval of about $450,000. I don't know where the Winnebago Securities Corporation was organized. It was organized by the Board of Directors and two shareholders of the Manufacturers National Bank.

Q. What was the fact as to whether or not on June 11, 1931 any of the bank's assets had been pledged?

Defendants object to question as not the best evidence and calling for the opinion and conclusion of the witness.

The Court: Overruled.

Exception.

A. Over $1,000,000 of assets of the bank had been pledged with the City of Rockford. $100,000 was pledged with the Continental Illinois Bank & Trust Company. The Federal Reserve Bank had approximately $156,000 advanced to the bank.

Q. From your knowledge of that bank and from what you learned when you examined it in April, 1931, were there any other available assets of that bank which could be used to get money?

Defendants object. Overruled. Exception.

A. Very few. Possibly $100,000 additional. The bank had rediscounts in the Federal Reserve Bank. They had a deposit in the Federal Reserve Bank and they had discounted paper to that bank to the extent of $156,000.

Q. What is the custom in cases of that kind in case the Manufacturers Bank had any financial trouble with reference to the Federal Reserve Bank whether they take out of the deposit the amount of the discounted paper?

Defendants object as immaterial and irrelevant. Overruled. Exception.

A. The Federal Reserve Bank ordinarily charges back all rediscounts against the deposit balance. The Manufacturers National Bank had a deposit balance with the Federal
94 Reserve Bank in excess of $200,000. The Manufacturers Bank had in cash on hand on June 11 in excess of $400,000.

Q. Assuming that the Security Bank of Rockford had failed to open its doors on the next Monday morning, and that this Manufacturers Bank had a total of something over $600,000 available cash, what is your opinion as to how long that cash would have lasted?

Defendants object as merely the opinion and conclusion of the witness. Overruled. Exception.

A. In my opinion their cash available was not sufficient to carry them through another business day. I said that several times on the meeting of June 11 when Ekstrom was present.

Q. Mr. Baty, do you know as a matter of fact what happened to banks that remained open in Rockford on that Monday morning when the Security Bank closed?

Objection. Overruled. Exception.

A. I do.

Q. What was the experience of the Rockford National Bank as to withdrawals on that Monday when those banks closed?

Objected to. Overruled. Exception.

A. The deposit decrease in the Rockford National Bank that day was some place in excess of $700,000.

Cross-Examination of the witness M. R. Baty conducted by Mr. Kenworthy, of counsel for defendant.

I first learned that assets were pledged by the Manu-
95 facturers National Bank on the morning of June 11 when I arrived in town and I also learned at that time that a million dollars of their assets had been pledged to the City of Rockford. I knew that on yesterday when I testified in direct examination and also knew the amount of the loan from the Continental Bank yesterday, and also the amount of the loan to the Federal Reserve Bank. As a matter of fact the deposit of the Manufacturers National Bank with the Federal Reserve was something over $50,000 more than the assets pledged. It was my opinion on June 11 and I so expressed it to the directors present that the available cash of the bank was not sufficient to stand a protracted run in the event the Security Bank failed to open or was taken over. The first meeting I had with the Board of Directors was on Friday, the twelfth of June. I was mistaken when I said it was on the eleventh. When I stated on yesterday that a meeting was held on the thirteenth day of June which lasted through most of the night and which meeting was a combined meeting of a committee of the Manufacturers Bank and a committee of the Third National Bank, I testified that Mr. Ekstrom was present. I know he was not there during the whole session. I could not say positively he was present at any time. I did not testify to any conversation I had at that meeting where Mr. Ekstrom was present. So far as I know,

no conversation took place between me and the men gathered there or between the men gathered there and themselves that was in the presence of Mr. Ekstrom at that meeting. With reference to the exhibit that has been shown me, Exhibit 7, I did not see it until after the bank closed.

Redirect Examination by Mr. Hall.

96 I remember of Ekstrom bringing in sandwiches and coffee on that night to the committee and the examiner and his assistant. I haven't the slightest idea what time that was. When I testified about Exhibit 6 that the signature thereto was Eric Ekstrom's signature, I saw him put his name there. The names of A. R. Floberg, H. A. Taylor, B. A. Wilson were placed on there Sunday night and Mr. Ekstrom placed his name there on Monday morning. Mr. Ekstrom was present on Sunday night. He did not sign that night. I had a conversation with him on Monday. He said he was very sorry for his actions before and that he did not mean it and that he wanted to sign the resolution and he did. This was in the forenoon on Monday. The Security National Bank did not open its doors on Monday morning. At the time of my examination of the bank in April, I was informed that they were to be depositary of the City of Rockford and I informed them that they could not take the deposit in unless they secured it with bankers' acceptances or collateral of the same high character.

Recross Examination of the witness Baty conducted by Mr. Kenworthy, of counsel for the defendant.

When I testified that I remembered Mr. Ekstrom brought some sandwiches and coffee into the bank at the meeting that began Saturday night and ended Sunday morning, I said he brought sandwiches into the bank. Whether he came down with the committee, I do not know.

L. B. ACHOR, the plaintiff, a witness on behalf of plaintiff, in answer to interrogatories proposed to him by Mr. Hall, counsel for the plaintiff, testified:

I reside in Rockford, Illinois. Have since February 2, 1931 and became connected with the Manufacturers National Bank on February 2, 1931. I was not a director of the Bank
97 and owned no stock in it, but was active vice-president. I was connected with the Bank in that capacity from that time up until the bank closed. Since June 16, 1931, I have been Receiver, appointed by the Comptroller of the Currency.

Motion to strike the answer as not the best evidence. Overruled. Exception.

I know Mr. Baty who was on the witness stand and also Mr. Leyburn, the Chief Examiner of this District and I am acquainted with Eric S. Ekstrom and with Hugo Olson and A. R. Floberg.

Q. Who were the directors of the Manufacturers National Bank from the time you arrived in Rockford up to the time it closed?

Objection to as not the best evidence. Overruled. Exception.

A. A. R. Floberg was the President, N. F. Thompson, Chairman of the Board up until the time of his death in March, 1931, Hugo Olson, Director and Vice President, Eric S. Ekstrom, Oscar J. Milburn, H. A. Taylor, F. F. Nelson, C. E. Lindbergh and L. C. Miller from some time in the early part of May until the bank suspended. They are all of the directors that I can recall at this time. I have in my possession the records of the Winnebago Securities Corporation. They are not in Court but are at Rockford. I know of the formation of this corporation. I have examined the books of the bank from time to time. I had a talk with Eric Ekstrom about the Winnebago Securities Corporation but I do not remember the substance of any of those conversations. I know something about the deposit of the City of Rockford of some money in the Manufacturers Bank. I know this latter matter was talked about in directors' meetings which were attended by Mr. Ekstrom at the Bank. At one time on a special meeting on May 21, 1931, the conversation con-
98 cerned the approval of the loan Committee of investments made with the cash that was created by the deposit of the City. The substance of it was that Mr. Eric S. Ek-

strom approved by telephone. I can't tell the exact conversation I had with Ekstrom about this. I can't prove it by the minutes that I had any conversation with Ekstrom but I had a conversation with him some time between May 19, and June 1, 1931. That conversation was in the Bank. Mr. Floberg, Mr. Taylor and myself were present. Had more than one conversation. Cannot remember the exact dates of any of them. The substance of the conversation was that I said we would invest those funds in liquid assets which could be placed with the City Treasurer, an amount equal to the total City Treasurer's account. They answered that these investments should be made in liquid collateral which should be pledged to the City Treasurer to secure his account, and this was done. I said at these meetings that information brought to me indicated that the City deposit would only be there for approximately 45 days, the principal part of it, approximately $1,000,000 would stay from May 19 until July 1, 10 or 15. I can tell nothing further that was said at those meetings. I said the City Treasurer had told me that according to his records bonds and interest were due in substantial amounts about July 1 and that those bonds which were due and the interest would be payable at the Manufacturers National Bank and Trust Company and that these payments would take approximately $1,000,000.

Q. Mr. Achor, did you know the condition of the Bank on June 12, 1931, as to how much cash the bank had in its vaults?

Objected to. Overruled. Exception.

99 A. Approximately $400,000. At that time the Manufacturers Bank had on deposit with the Federal Reserve in Chicago in excess of $200,000. It had rediscounts of approximately $156,000 of its assets with the Federal Reserve Bank. It was the usual custom of the Federal Reserve Bank in case of financial trouble to charge all indebtedness to the Federal Reserve Bank to the Commercial Bank's account. That included the $156,000 worth of rediscounts. The Manufacturers Bank had borrowed $100,000 of the Continental Illinois Bank and Trust Company of Chicago and had pledged in excess of $100,000 of bonds, listed marketable bonds.

Q. State to the Court whether or not on June 12 the Bank had in its possession any assets, any paper, that it could raise money on. I mean on June 12, 1931.

Objected to, particularly the latter part of the question as calling for the opinion and conclusion of the witness. Overruled. Exception.

A. Approximately $100,000, in my opinion.

Q. Upon what is your opinion based?

A. Upon an examination of the paper with a representative of the Continental Illinois Bank & Trust Company in the Bank at Rockford.

Motion to strike out the answer as being based upon the opinion of some one else. Overruled. Exception.

The total deposits in the Manufacturers National Bank at the close of business on June 12, 1931, were $4,254,543. Included in this amount there were $2,116,109.96 of commercial or checking accounts. Included in that was approximately $1,000,000 of the City of Rockford deposit. There were 100 also deposited in savings accounts in that bank on that date $1,812,120.64. There were demand certificates issued by the bank amounting to $235,103.60 and postal savings of $41,983.47, thrift accounts amounting to $27,647.50 and in another division of the thrift account $63.14 and in a vacation club $6.25. The demand certificates above listed were payable by the bank on demand. By commercial accounts I mean checking accounts upon which depositors could bring their checks to the bank and demand the money. On the savings accounts the rules of the savings department required 60 days' notice if the bank so chose. To my knowledge the bank had never required this notice. Up to that time the bank had paid out savings accounts as they were required. Savings Accounts drew interest. I was present at a meeting of the Directors of the Manufacturers National Bank on June 12, 1931. That was held in the banking room. There were present Eric S. Ekstrom, Hugo Olsen, H. A. Taylor, A. R. Floberg, F. F. Nelson, L. C. Miller, I think B. A. Wilson, Oscar J. Milburn, myself and Mr. Baty, National Bank Examiner, the witness who testified here. This meeting was about 11 o'clock A. M. At that meeting in the presence of Mr. Ekstrom, Mr. Baty said a contract had been signed between the Security National Bank and the Swedish-American Bank of Rockford, and it was hoped that the Security Bank could be taken over or merged with the Swedish-American Bank so that on Monday morning the Security Bank would be under the cover of the Swedish-American National Bank. This, however, was subject to an examination of the assets by the Swedish-American Bank and was incomplete at that time. 101 He said the preliminary contract had been signed. He also said in his opinion this would create a disturbance among the public, among the depositors of all banks of Rockford, that there undoubtedly would be runs on every bank in town and Mr. Baty said "Your cash reserves are not suffi-

cient to withhold any unusual or extended run". He asked for a resolution to be passed authorizing him to discuss the condition of the Manufacturers National Bank & Trust Company with any other bank in Rockford. It was passed to that effect and delivered to him. A letter was delivered to him authorizing it. Baty said he wanted that letter which would be his authority to go to any other bank in Rockford and discuss the condition of the Manufacturers National Bank with that other bank toward carrying out a merger or take over. I do not remember anything else that was said. Mr. Baty said if the Security Bank was not taken over by the Swedish Bank or some other bank it would not open for business on Monday morning. Baty also said "If the Security Bank fails to open Monday morning you will have a run on this bank. I don't think your cash reserves are sufficient to withstand a full day's business." The minute book of the bank, Plaintiff's Exhibit 7, was dictated by me shortly after the meeting. The record contains a reference to the appointment of a committee. The committee appointed were A. R. Floberg, Hugo Olson, H. A. Taylor, Ralph E. Thompson, and L. B. Achor. At that meeting Mr. Baty said that the committee would confer with a committee from some other bank in Rockford relative to the assets of the Manufacturers National Bank and they would make an examination together. I remember a meeting of the Board of Directors on June 14,
1931. This was Sunday. It was held in the banking
102 house. Ekstrom was present. I acted as Secretary of
that meeting. The Plaintiff's Exhibit 12 which you hand me is the record of that meeting and it is true and correct. It was dictated by me and written within 30 minutes after the meeting. Ekstrom was present. There was a resolution passed at that meeting. (Ex. 12) It is my recollection that Hugo Olson made the motion and it was seconded by Eric S. Ekstrom. There was another meeting of the Board of Directors on Sunday, June 14, at 8:05 P. M. That meeting was held in the basement of the Manufacturers Bank. I acted as Secretary of that meeting. Ekstrom was present. Also Olson, Floberg, Taylor, Wilson and Milburn. Plaintiff's Exhibit 6 which you show me was a resolution presented at that time. I saw the signatures put on that paper with the exception of the signature of Ekstrom. Each signature was made by the person whose name appeared. I know the signature of Ekstrom. I would say that the signature appearing on Exhibit 6 is his genuine signature. I was present at the meeting that began Saturday night and ended about daybreak on

Sunday morning. I recall that some time between twelve and three o'clock Ekstrom and Olson and maybe one or two others delivered to the group assembled there some sandwiches and coffee. The assembled group consisted of the committee appointed by the directors of the Manufacturers National Bank and a committee appointed by the Third National Bank which were appraising or going over the assets of the Manufacturers Bank. These committees began their work about six P. M. on Saturday, June 13. The meeting continued until 7 A. M. on June 14. This was Sunday morning when the work was stopped. Up to that time the assets of the bank had been tabulated as to accepted and rejected assets in case
103 a take over was made. That is to say the Third National Bank had said what assets they would take. The next I saw of Eric Ekstrom was at 1:15 P. M. on Sunday afternoon.

Q. At that time was there anything said in the presence of Ekstrom as to the result of that tabulation?

Objected to by the defendants as calling for the opinion and conclusion of the Committee of the Third National Bank as to the value of assets and not as to any fact. Objection overruled. Exception.

A. Nothing was said to my knowledge to Ekstrom until later in the evening. Ekstrom was present.

Q. What was said?

Defendants make the same objection. Overruled. Exception.

A. Mr. Baty said to the Board of Directors substantially that the Third National Bank had formed its conclusion from their examination of the assets the night before; that they would require $750,000 in cash as a guaranty before they could take over the assets and assume the deposit liability of the Manufacturers Bank. Some one said, I cannot state who it was, that it was apparently impossible to raise such a sum of money as that. This was before Plaintiff's Exhibit 6 was signed. Within the course of the next thirty minutes after that conversation all of the directors signed except Ekstrom. I know the Manufacturers Bank owned its banking house and I know that it was carried on the books for the value of $538,000.00 and that its furniture and fixtures were carried at a total of $54,197.21, making a total book value of bank and furniture and fixtures of $592,197.21.

104 Q. Has the Comptroller of the Currency levied an assessment upon the stockholders of the Manufacturers Bank & Trust Company?

Objected to as not the best evidence. Overruled. Exception.

A. Yes, sir. I have endeavored to collect those assessments. I have had the assets of the bank in my possession since I became Receiver.

Q. What have you done with reference to attempting to collect those assets?

Objected to as immaterial and irrelevant. Overruled. Exception.

A. I have used every means to collect the assets. Where, in my opinion, it was necessary to bring suit, take judgment, order execution or judgment, I have; many of them I have worked along with the debtors on a payment plan and attempted to collect every cent I can. And that has been true with the assessments levied by the Comptroller. The Bank has paid to its depositors 46% of the amount of their deposits. I have an opinion as to the reasonable value of the assets that are left.

Q. In your opinion will you be able to pay the depositors of that bank 100%?

Objected to as immaterial and irrelevant, and calling for the opinion and conclusion of the witness. Overruled. Exception.

A. No, sir.

From February 2, 1931 to June 13, 1931, disregarding the approximate $1,000,000 of city funds, there was a deposit decrease of approximately $500,000, in the Manufacturers Bank. I have in my hands as Receiver of the Manufacturers Bank the collateral notes that were in the bank as collateral to the Winnebago Securities Corporation. I have been able to collect a small amount of these collateral notes. There
105 is in the bank now three notes of the Winnebago Securities Corporation totaling in excess of $200,000. I know that the Winnebago Securities Company has no assets other than those which are pledged to secure collateral to the Manufacturers Bank. I was president of the Winnebago Securities Company from the time I went to the bank on the second of February, and I served until the suspension of the bank. The notes of the Winnebago Securities Company had been deposited to the bank before I became president of the Securities Company. The records of the Securities Corporation are in my possession. With the exception of a small amount of cash which was collected from time to time, the Securities Corporation had no assets other than the notes which it had pledged with the bank. Among the assets of the bank was a note signed by Eric S. Ekstrom. That has not been paid. I have attempted to collect it.

Q. Do you know the total amount of the debt of Eric S. Ekstrom to that bank?

Objection. Overruled. Exception.

A. He has a total liability there in excess of $30,000.

Q. Do you know how much Ekstrom owed the bank at the time it closed and the direct liability of his own?

Defendants object. Overruled. Exception.

A. $53,000.00. He also had an indirect liability of approximately $31,000. He owned 85 shares of stock in the bank as I recall. I have talked with Ekstrom since the bank closed about paying his debt and he said he could not pay it. He said if I were to press him that he would be forced into bankruptcy and probably would not get anything. With
106 the exception of possibly a small amount on his stock assessment, he has paid nothing. I think he paid two or three hundred dollars on his stock assessment.

Q. Do you know how you can make him pay that debt?

Objected to. Overruled. Exception.

A. No, sir, I don't know of any way to enforce collection.

The witness L. B. ACHOR, on cross-examination conducted by Mr. Kenworthy, testified as follows:

I have been in the banking business all my life. Before coming to Rockford I was an examiner for the Federal Reserve Bank of Chicago. I have also been a bank examiner employed by the Comptroller. Have been in the banking business substantially all my business life. I was made Vice President of the Manufacturers National Bank immediately upon my employment and the duties assigned to me were to give attention to the loans, collections, security and payment of loans due that bank. And I immediately became acquainted with the loans that the bank had made. I was in the bank every business day and consulted with the other officers of the bank with reference to the problems of the bank, daily. I was more or less familiar with all discounts of the bank and shortly after coming into the bank I knew of this matter of the Winnebago Security Corporation, its connection with the Bank. I knew that the Winnebago Securities Corporation had taken some securities, had purchased from the bank some securities that the Comptroller was not satisfied with and that the amount of those securities approximate $397,000, and I knew that the Winnebago Securities Corporation had paid or agreed to pay $150,000 in cash and give its note or notes

secured by the collateral purchased in payment for that
107 collateral. That had all been arranged and $100,000 had been paid before my connection with the bank. And subsequently it paid $50,000 more to the bank while I was an officer of the bank and of the Winnebago Securities Corporation. Aside from the notes it had purchased from the bank, I know of no other assets that the Winnebago Corporation had. I was familiar with that transaction from the day I started in the employment of the bank; and I know that that transaction did not make the Manufacturers Bank insolvent at that date. If reports were made by the bank between the second of February and the close of the bank, I saw it before it was sent to the Department. I know there was one called report made by the bank between my employment and the 14th of June, 1931. And there was also a letter sent to the Comptroller's office signed by 6 directors of the bank, approximately once a month. I had nothing to do with the preparation to those letters. I saw them, however, before they were mailed. I have a copy of the report that was made but do not have it with me. That was a report made by the Examiner to the Comptroller of the Currency. It reflects the true condition of the Manufacturers Bank as I understood it at the time. With reference to the deposit of the City of Rockford's money, one of the employees of the Manufacturers bank was elected as treasurer of the City of Rockford. I knew it was a custom for the Directors of the Manufacturers Bank to go on the treasurer's bond. I also know that when arrangement was made between the Treasurer of the City of Rockford, who was an employee of the Manufacturers Bank, and the directors of the bank by which the deposit of the City of Rockford was to come into the bank, that they would be immediately invested in quick assets, mostly bankers' ac-
ceptances drawing a very low rate of interest and prac-
108 tically 100% liquid, and that under the arrangement made these securities that were purchased with the City's money were placed in a special vault under the control of the City Treasurer and one of the three officers of the bank, so that none of those securities could be withdrawn by the City Treasurer without the knowledge of the officers of the Bank. That was what I call a pledge of the assets. The intent and purpose of that was not to protect the directors of the bank who had signed the Treasurer's bond, in my opinion. While the arrangements were made before I became an employee of the bank, the details of the handling of the account were worked out later after I was there. I was active in the pur-

chase of securities with the money that had been deposited by the City. The Loan Committee of the bank O. K'ed. all of the investments and we discussed it prior to there being made so I would say it was done with the full authority and knowledge of the Loan Committee of that Bank. In fact the whole Board of the bank knew it. The reception of that deposit and the investment of the proceeds of the deposit in quick securities did not change the cash condition of the bank one bit. I have a financial statement of the bank for the last day of May, 1931, but I do not have it with me. I have it in my custody. These statements were prepared by the general bookkeeper. I examined them almost daily and they reflected the true condition of the Manufacturers Bank as shown by the books. The bank on June 13 or June 12 had approximately $400,000 in cash on hand in actual currency and exchange. It might have been made up of a lot of cash items and checks on other banks in the town which are usually counted in the cash balance as cash. It was quickly and readily convertible into cash. The amount was slightly
109 in excess of $400,000. I have not the exact figures with me. I will get same and state the exact amount. In addition to that the Manufacturers Bank had on deposit with the Federal Reserve Bank in Chicago somewhere around $200,000. The legal reserve of the bank was fully intact. By legal reserve I mean every National Bank or member of the Federal Reserve System is required to keep a legal reserve which is figured a percentage of its deposits in the different communities. In addition to that the Manufacturers Bank had securities with the Federal Reserve Bank which it had rediscounted to the amount of $156,000. It had contingent liabilities of the Federal Reserve Bank of $156,000 if none of those rediscounts were paid. If, however, they were paid in full by the endorsers or makers of them there would be no liability from the Manufacturers Bank to the Federal Reserve Bank. In addition to that the Manufacturers Bank had a deposit with the Continental Bank of Chicago. I cannot give you the exact figures or approximate them. It had also rediscounted a note for $100,000 and pledged marketable bonds to secure the investment of that $100,000. The bonds so deposited were worth the amount of the indebtedness. So that the Manufacturers Bank had available in cash the amount of that loan from the Continental Bank so that instead of $100,000 in bonds it had $100,000 in cash. On the first day of June, 1931 the Manufacturers National Bank of Rockford, Illinois, was, to my knowledge, solvent. It was solvent on the second

and the sixth and up to the twelfth of June it was solvent and in my opinion on the 13th day of June it was solvent. There had been no material change in the condition of that bank
110 from the first day of June until the thirteenth, except that there had been a decrease in deposits. By that I mean that the withdrawals had been in excess of the deposits. I can't tell you off hand, nor can I approximate the amount. Notwithstanding the withdrawals in excess of deposits during the period from the 1st day of June until the 13th day of June, it was my opinion that the bank was still solvent on the 13th day of June. By referring to my records, I find that the total deposits on June 1 were $4,410,549 and on June 13, $4,147,368, a decrease of approximately $270,000. I was refreshing my recollection from a daily financial statement of the Bank. Between June 1, 1931 and June 13, 1931 the deposits of the City of Rockford had increased $26,165.89. The daily slips which I have produced, dated from June 1 to June 13, respectively, are not complete statements of the assets and liabilities of the bank. It lacks a statement of many of the assets which are not listed on those statements. These statements are made up particularly to show the cash position of the bank. The slip which I produced dated June 1, 1933 is a mistake. It should read "June 13, 1931". It is a copy that was made up this morning and hence the error. I would like to correct that to read "1931" instead of "1933". I am not able to approximate the amount or value of the cash assets that are not shown on these daily statements. These statements simply show the cash and bonds. They are intended to be a cash position statement. On the June 1, 1931 statement, there appears an item "Continental $6,770.39". That means the balance due from the Continental Bank to the Manufacturers National Bank was that amount. Immediately underneath that is "C D Continental $250,000." That repre-
111 sents certificate of deposit issued by the Continental Bank to the Manufacturers Bank. Underneath that is Union Trust $295.70. That means there was on deposit in the Union Trust Bank that amount to the credit of Manufacturers Bank. Underneath that "National City $2111.02", that indicates there was on deposit in the National City Bank that amount. Underneath that is the word Federal $290,702.90. That means there was on deposit to the Federal Reserve Bank to the credit of the Manufacturers Bank that sum. Underneath that is the item Fed. transit $37,724.63. That means an item sent to the Federal Reserve Bank for credit for which they had not received credit as yet. These

items were in transit at the time and when received by the Federal Reserve Bank would be credited to the account of the Manufacturers Bank. Underneath that on the daily statement of June 1 are the words Chase $12611.74. That means that there was on deposit in the Chase National Bank of New York City that amount to the credit of the Manufacturers Bank. Underneath that is a statement Commerce $859.65. That means that there was on deposit in the National Bank of Commerce at St. Louis a credit of that amount due to the Manufacturers Bank. Underneath is the word Cash $208,898.04. That means that there was in cash or cash items in the Manufacturers Bank that amount of money. So that the cash in the Manufacturers Bank and due from Banks on the first day of June, 1931 was $809,978.07 and on the 13th day of June, at the close of business of that day the cash in the bank and cash due from banks—that is the cash in the Manufacturers Bank, together with cash due from banks, had
112 increased to $825,955.17. On June 1, 1931 the bills receivable of the Manufacturers Bank of Rockford were carried on their books at a value of $2,429,478.54 and on the 13th day of June the bills receivable of that bank were carried on their books in the amount of $2,363,601.53. The deposit liability of the Manufacturers Bank on June 1, 1931 was $4,410,549.00 and the deposit liability of the bank at the close of business on the 13th day of June was $4,147,368. On the 12th day of June the deposit liability of the bank was $4,254,543 and on the 13th day of June the deposit liability had been reduced to $4,147,368 so that on June 13 there had been withdrawals from the bank in exact figures of $107,175. The Manufacturers National Bank of Rockford was open all day on June 13. It had cash enough to meet all of the demands upon it on June 13. It honored every demand that was made upon it on June 13 and the same is true of June 12, and at the close of business on June 13 after honoring all the demands that were made against it, it had in cash, or due from banks, the sum of $825,955.17. The deposit liabilities that I have heretofore testified to as of date June 1 and June 13, respectively, included the deposit liability to the City of Rockford in addition to the cash that the bank had in its vault and on deposit in banks. It had bonds of $358,227.54 and on June 13 it had bonds of the value of $348,402.54 so that the bonds had been depleted during that period to the extend of about $10,000. On June 12, 1931 the Manufacturers Bank owned bankers' acceptances to the amount of $499,750.32 and on June 13 it owned the same amount of

bankers' acceptances. On June 13, the amount of bonds
113 that the Manufacturers Bank of Rockford owned was $331,181.30 and on June 12, $348,402.54. On June 1 the bank owned Bankers' Acceptances amounting to $499,750.32. This item had not changed between June 1 and June 13. On this daily statement of June 1, 1931 appears an item "Commercial Paper." That means the Bank owned commercial paper. This particular item was made up of General Motors acceptance paper and such other paper and the same high grade character which is generally known among bankers as quick assets. So the bank owned $70,000 of those quick assets on June 1, and owned an equal amount on June 13 at the close of business. The next item on this statement is Avail. Fed. That means funds coming out of transit accounts listed above and which from this date would be available. So that the transit account shown on the statement would be decreased that amount. On the statement of June 1, under the head "Pledged with City Treasurer" that means that the amount of assets therein represented were behind the city deposit, and are a part of all those mentioned above. If you wanted to show the natural condition of the bank, excluding the city treasurer's account, I suppose you would subtract the accounts pledged from the city treasurer's account on the one side and then you would subtract the city's deposit on the other to correctly reflect the true condition of the bank. There were more assets pledged to secure the city's account than the city's account amounted to. This was a very active account and changed from day to day but on June 13 there was a margin of $170,000. I don't know when taxes are paid in Rockford. As the usual thing when people pay their taxes they pay them by checks on the bank. While the Manufacturers Bank was a depositary of the city
treasurer of Rockford it was not a depositary of the
114 county and state taxes. I regarded the depletion of deposits of $270,000 in a bank the size of the Manufacturers National Bank during the tax paying period as an unusual depletion of deposits. I don't know that I was particularly alarmed at this decrease in deposits but I knew if it continued indefinitely that the same thing would happen to that bank as would happen to any other bank. I was concerned about it. However it did not indicate to me as an officer of the bank that the bank was insolvent or nearly approaching insolvency. When Mr. Baty the National Bank Examiner came to Rockford on June 11 or 12, Mr. Baty told me that the Security Bank was in trouble and he asked

"What effect is that going to have on you?" I told him I could not tell. He made no further statements at that time. I had other talks with him several times during Thursday, Friday, Saturday and Sunday at times other than when he met with the directors. I discussed the situation with him. I could not say that I had anything to do with the calling of the directors together at any of the meetings that were held of the directors. The first meeting was held June 12 somewhere around noon; it convened about eleven o'clock and lasted approximately an hour. I was present during the whole of that meeting and Mr. Baty was there a part of the time. I would say he was there half of the time. The latter half. The Chief Bank Examiner was not there. Before Mr. Baty arrived at the meeting, the meeting was called and waited a few minutes until he arrived. There was a discussion while awaiting his arrival of the general conditions in Rockford. I can't remember any special thing that was stated prior to the arrival of Mr. Baty. In substance
115 the subject discussed was concerning passing a resolution and giving the examiner authority to discuss the condition of the Manufacturers Bank with any other bank in Rockford. As I remember it this was discussed before the arrival of Mr. Baty but I don't remember who broached the subject. Neither do I remember anything that was said by anybody before the Bank Examiner arrived. I don't remember what was said. The main thought up to that time was the condition of the Security Bank and the balance of the discussion was a conjecture as to what effect the closing of the Security Bank might have on the other banks in Rockford. There was nothing said, prior to the time the Examiner came, about closing the Manufacturers National Bank at that time. When Mr. Baty came to that meeting it was in the front office, first floor of the Manufacturers Bank Building, in the president's office. This was a small office and the meeting was held during banking hours of that day. The bank was open for business at the time. When Mr. Baty came in he said in effect that the Security Bank had entered into a contract with the Swedish-American Bank for consolidation. He said the contract was signed. I don't remember of him showing the paper purporting to be the contract. Then Baty told the meeting that in the event the Swedish-American Bank did not take over the Security Bank and in the event that the Security Bank was closed, that that would likely start a run on the remaining Rockford Banks. He said that the cash position of the Manufacturers Bank was such that if a run took

place that they would not be able to withstand any undue withdrawals; probably would not be able to withstand the day's business. I don't remember whether he said there were too many banks on the east side of the river in
116 Rockford or not. I don't remember that he said it would improve the condition and restore confidence of the people in his opinion if there were fewer banks and at least two mergers took place. In substance he said that if the Security Bank and the Swedish-American Bank would be put together and the Manufacturers Bank and probably the Third Natl. Bank, that would leave three banks on the east side of the river instead of five and it would make for a better condition all around. I think he said that. I can't recall anything else that was said there at that meeting. He said that if this proposed merger between the Security Bank and the Swedish-American Bank went through it would become effective between Saturday, at 1:30, and nine o'clock Monday morning. He offered an option as to what effect a merger of the Security Bank and the Swedish-American Bank would have on the banking situation in Rockford. He said that it undoubtedly would upset the minds of a lot of depositors and probably cause a run in the banks of Rockford. Even though it would be taken over and under the roof of the Swedish-American Bank there would be some unrest and some withdrawals. He said if the Security Bank does not open Monday morning there undoubtedly will be a run on all of the other banks in Rockford. He advised the Manufacturers Bank to negotiate for a merger with some other bank and he asked for authority from the Board of Directors to approach some other bank to discuss the question of merging and resources. I don't remember that he said that he was desirous of doing this to improve the general banking conditions in Rockford. I don't remember that at that particular time he discussed, before the directors, what bank he intended to approach in regard to a merger with the Manufacturers. At that
117 meeting various of the directors talked to him very freely. I don't remember what any particular one said. I do remember one of the directors saying to Mr. Baty that he felt that they knew the temper of the people of Rockford and that they felt they would be able to withstand a run: but who said it I cannot say. I don't remember if more than I expressed that opinion. I remember nothing other than I have already stated as to what took place at that meeting except that a resolution was passed by the Board of Directors. There was no discussion there as to the solvency of the Manufacturers Bank. Mr. Baty said the cash position was so small

that they could not stand an unusual withdrawal on Monday. I don't recollect that he stated what the cash position was. Neither did he predict the amount of the run on Monday although he said that the run would undoubtedly use up all of the available cash resources of the Manufacturers Bank in his judgment. The next meeting Baty had with the directors of the Manufacturers Bank was Sunday night, at eight o'clock P. M. although on Saturday night he met with the committee which was selected by the Board. The next meeting between Baty and any directors of the Board was on Saturday night. I was present when that meeting convened and was there all night up until seven o'clock the next morning. I have no recollection whether Eric Ekstrom was there when the meeting convened or not. I have no recollection of seeing Ekstrom at that meeting at any time except along around two o'clock in the morning when he and Mr. Olson brought some sandwiches and coffee. To my knowledge, that was the only time he was at that meeting and he was there probably thirty minutes or an hour. There were some discussions while
118 he was there. I have no recollection of anything that was said while Mr. Ekstrom was there. No action of the Board of Directors was taken at that meeting Saturday night that ended Sunday morning. There were no statements made as to the conditions upon which a merger might be effected. All that was done was a discussion of the assets of the Manufacturers Bank and the value of each. That is, the assets of the Manufacturers Bank was composed of different items of securities and these were gone over one by one at that meeting and there was a discussion as to the value of each item and the collateral behind each item and the securities and loans. The parties representing the Third National Bank would take down the items and valuation of the securities that they were examining. The committee representing the Manufacturers Bank would not put down their estimate of value. The figures that were put down by the Third National group were not exhibited to the Manufacturers National Bank group there at that meeting that night. The Third National group asked questions of the Manufacturers as to the value or their estimation of value of the different items; but what the result of the examination of those assets were was not learned by the Manufacturers group until Sunday night. And the first information that I had was from Mr. Baty and he conveyed that information to the Board of Directors of the Manufacturers National on Sunday night at a meeting called by the President of the Bank at Mr. Baty's suggestion. I was present at the meeting Sunday

night. I heard substantially all that was said. Beside Mr. Baty, Alfred P. Leyburn, Chief National Examiner represented the Comptroller. Mr. Baty stated to the directors there present the result of the negotiation with the Third
119 National Bank. He said in effect that the Third National Bank, if there was a merger between it and the Manufacturers Bank, would assume the depositors' liability of the Manufacturers Bank only on condition that the Manufacturers Bank put up $750,000 in cash. I remember in that statement that Mr. Baty made that he stated that the Third National Bank would not take over the building of the Manufacturers National Bank; that that building was a part of their rejected assets. They made a list of the assets consisting of two columns. One column "Accepted" and one column "Rejected." The accepted assets did not total enough to cover the deposited liabilities so that the Third National Bank would feel secure in taking them without adding $750,000 in cash. In the rejected assets was the building and many items of assets. I do not remember what the rejected assets consisted of. The rejected assets were carried on the books of the Manufacturers Bank at more than $750,000. I don't know where that list went to. It was in Mr. Batey's possession the last I saw of it. Mr. Ekstrom at that meeting made quite a long discussion as to whether or not the bank would close. I can't repeat what he said. The directors there present stated that there was nothing to do except to reject the offer as they could not put up $750,000. I can't quote what was said nor can I give the substance of it. Mr. Ekstrom stated that he did not believe the proposition was equitable or fair. That was the substance of his talk and the question was presented as to whether they would vote to accept that or not. I can't tell you what was said. I have told you all I remember. Mr. Leyburn, the Chief Examiner, said that a resolution would have to be passed turning the bank over to the Comptroller or else the directors
120 of the bank would assume the responsibility entirely of opening the bank Monday morning and if it opened up no doubt it would have to close soon. I can't say that he demanded a resolution closing the bank and turning its affairs over to the Comptroller, I do remember Mr. Leyburn said that if they kept the bank open they would be keeping open an insolvent bank. I did not hear him say that they would be prosecuted for receiving deposits if they kept the bank open. This meeting started at 8:05 P. M. and the resolution was signed at 8:35. This notation on plaintiff's Exhibit 6 "Dated at Rockford, Illinois, this 14th day of June, 1931,

and signed at 8:30 P. M." I presume was made at that time. I don't know. I didn't see it written nor did I dictate it. I saw it lying on the table at the meeting. Can't say that I saw it when the meeting first convened. I don't know whether Exhibit 6 was drawn before the directors' meeting was convened. I did not say I dictated the resolution. I had reference to the other meetings. Mr. H. A. Taylor, a director, offered that resolution. It was not in his hands when I first saw it. I saw it on the desk or on the table downstairs there where the meeting was held. This Exhibit 6 recites that it was a special meeting of the Board of Directors of the Manufacturers National Bank and Trust Company, Rockford, Illinois, held June 14, 1931, at 8:05 P. M. and the first line of the body of the instrument says that a special meeting of the Board of Directors, etc. was held at the hour of 7 o'clock P. M. on June 14. I don't know which is right. I don't know at what hour the meeting was held.

I did not state on direct examination that I saw Exhibit
121 6 passed on the fourteenth of June. I did see it signed with the exception of the signature of Ekstrom. I did not see him sign it. He did not sign it that night. He stated positively he would not sign it. Chief Examiner Leyburn left the meeting that night. I don't know whether he left at the particular time Ekstrom said he wouldn't sign the resolution. He was afterwards called back to the meeting, within a few minutes. He was so thoroughly disgusted with the affairs of the meeting that he left the meeting and he said he would be at a certain place and if they wanted him they could call him, or something to that effect. They called him within two minutes after that and after he was called back all of the directors except Ekstrom signed the resolution. It is not a fact that Ekstrom signed that night after Leyburn was called back. The bank building and furniture which was an asset that the Third National Bank had rejected was carried on the books of the bank at a valuation of $592,000. I did not see the figures of what other assets were rejected. As a banker, I know there has been a general depression in and around the City of Rockford and throughout the State of Illinois generally that has depressed values to an unusual degree in the last two years. There has been a study decline in values and that decline has been most marked from 1931 to the present time. There has been a depreciation in value of the assets caused by the depression since I, as Receiver, took over the assets of the Manufacturers Bank. There has been many of the debtors of the Manufacturers Bank whose financial standing and ability to pay has been decreased since I

took over the assets of the Bank, to my knowledge; and I know that what I, as Receiver, have been able to realize
122 from the assets of the Manufacturers Bank is not any indication as to the value on June 14, 1931. The fact that the bank was closed and not a going institution depressed the value of its assets to a great extent. The good will of the Bank was gone. The thing that occurred on the 12th or 13th of June, 1931 that in any way changed the condition of the Manufacturers Bank of Rockford to any material extent was withdrawals by depositors in those two days and a growing unrest of all bank depositors was a big item. There was unrest during the 12th and 13th days of June. I can give you the figures of deposits and withdrawals on the 12th and 13th of June. There was withdrawn from the individual deposits on June 12, 1931, $1,083,770.15 and there was deposited to the credit of individual depositors the sum of $1,011,881.49 and on the 13th day of June there was withdrawn by individual depositors $1,064,303.71 and during that day there was deposited by individual depositors $82,097.85, and in the savings deposits of the 12th of June there was withdrawn $4843.88 and $361.37 deposited. And on the 13th of June there was $19,933.16 withdrawn and $2102.53 deposited. Cashier's checks cashed on June 12, $1580.33 and the ones issued on that day were $2220.59 and on the 13th day of June the cashier's checks cashed amounted to $8983.43 and those purchased amounted to $2092.92 and there was only a change of twenty-five cents on the 12th and 13th of June in the Postal Savings Account. In the Thrift account on June 12th there was $140.00 withdrawals and $61.50 paid in. On the 13th there was $58.00 withdrawn and $20.25 deposited. There was no change in the vacation club account. Calling your attention to Plaintiff's Exhibit 6 again, apparently there is a line drawn through certain words in the second paragraph of
123 that resolution. That does not refresh my recollection as to anything that took place there during that meeting. I do not know who erased those words. I don't know whether the erasure was made before or after the paper was signed. The matter of striking those words did not come up before that meeting to my knowledge. I don't know who struck the words out or when it was done. The Security Bank failed to open its doors nine o'clock Monday morning, June 15. The Manufacturers Bank did not open its doors on the morning of June 15. It was in the hands of the Comptroller at that time. The Peoples Bank and Trust Company of Rockford, Illinois, closed an hour or so after they had opened on the fifteenth. Since that time and during the time that I

have been attempting to liquidate the assets of the Manufacturers Bank, the Rockford National Bank, the largest bank in Rockford, closed its doors; and also another large bank, the Forest City Bank. Since I was appointed Receiver there have been five bank liquidations going on in Rockford and that has had a good deal to do with the depression of values in the City of Rockford. Many people who were stockholders and borrowers in some of these banks were involved in other banks. I cannot tell you what is the book value of the assets I, as Receiver of the Manufacturers Bank, have on hand. I don't have anything from which I can refresh my recollection. The daily statement for June 13, 1931 shows the book value of all assets of the Manufacturers National Bank of Rockford, on June 13, 1931. I produce the financial statement of the Manufacturers National Bank at the close of business on June 13, 1931, as reflected by its books.
124 This statement shows resources of $5,315,378.81 and resources are composed of the items that are listed above that figure. Among the items appear clearings of $39,546.25. That is items on other banks in Rockford that were due from the other banks to the Manufacturers National Bank. It means checks on other banks in Rockford that were deposited in the Manufacturers Bank that day and did go through the clearing house to the respective banks on the following day. And the liability side of this financial statement shows a total, including capital of $500,000, surplus of $200,000, undivided profits of $49,810.54 and reserves of $8721.60 and the other items listed therein, of $5,315,378.81. These four papers which I produced and which are marked Defendant's Exhibits 1, 2, 3 and 4, are the daily statements of the cash condition of the bank of the dates June 1, 6, 12 and 13, 1931. I also produce a paper which is a copy of the original financial statement of the Manufacturers National Bank at Rockford, Illinois, at the close of business on June 13, 1931. This is a copy of the financial statement of the Bank as shown in the Receiver's receipt as prepared by the National Bank Examiner. It represents the condition found by him as of the close of business of the Manufacturers National Bank and Trust Company on June 13, 1931. This paper that I refer to is Defendant's Exhibit 5. I have complete records of the bank showing the number of checks that were paid and honored by the Manufacturers National Bank on June 12 and 13, 1931, but I do not have them here in Court. I cannot from recollection approximate the number of checks that were honored on those days or approximate the number of deposits that were made on those two days. I will make such compu-

tation from the records. I have in my possession other
125 ledger accounts of the Manufacturers National Bank with the Mechanics Universal Joint Company besides Plaintiff's Exhibit 3. I have the ledger sheet showing the savings account of the Mechanics Universal Joint Company with the Manufacturers National Bank of Rockford, but I do not have it in Court. I will produce it before the case closes. I produced a ledger account between the Mechanics Universal Joint Company and Manufacturers National Bank for a period preceding Plaintiff's Exhibit 3. The paper I produced is marked Defendant's Exhibit 6 and this Defendant's Exhibit 6 truly reflects the whole balances, the dates of deposits and withdrawals and the balance that results from those deposits and withdrawals during the period from January 8, 1931 down to April 16, 1931. According to Plaintiff's Exhibit 3 there was a deposit made by the Mechanics Universal Joint Company with the Manufacturers National Bank of Rockford on June 8, 1931. The amount of that deposit was $44,617.21 and with that deposit there was a balance then to the credit of the Mechanics Universal Joint Company with the Manufacturers National Bank of Rockford, at the close of business on June 9, 1931, of $107,791.08. That balance would not include a savings account of the Mechanics Universal Joint Company if there was one at the bank. I have the sheets of the ledger account of the Manufacturers Bank with Eric Ekstrom. On June 13, 1931, the balance due Eric Ekstrom on his checking account was $1413.38; and in addition to that on June 13, 1931, E. S. Ekstrom had on deposit in a savings account with the Manufacturers National Bank, a balance of $736.89 and also another one of $294.73.

126 The witness, L. B. ACHOR, the plaintiff, being further cross-examined by Mr. Early, representing defendant E. S. Ekstrom, testified as follows:

The E. S. Ekstrom referred to throughout my examination is the same person as Eric Ekstrom, the defendant. With reference to Mr. Ekstrom's direct liability of $53,000.00 that I testified about yesterday, there was collateral to secure that. He had assigned his interest or equity in what is commonly known as the Grand Hotel, located on Broadway in Rockford, Illinois. The property was subject to a mortgage in the neighborhood of ninety or one hundred thousand dollars.

L. B. ACHOR, on redirect examination, conducted by Mr. Hall, testified as follows:

I have talked with Ekstrom about the Grand Hotel.

Q. What does he say?

Objected to unless he states the time. Overruled. Exception.

Objected to by Mr. Kenworthy on behalf of Mechanics Universal Joint Company as immaterial.

The Court: Admit the conversation as to Ekstrom but not as to the Universal Joint Company.

Exception.

A. The substance of his conversation was that his equity was gone in the property.

Q. Have you been able to realize a nickel on that property?

Objected to. Overruled. Exception.

A. I have not.

Under the plan that was in operation at the Manufacturers National Bank on and prior to June 13, in order to withdraw savings accounts a pass-book should be presented to the bank and a withdrawal slip made out. The teller would compare the savings pass-book with the bank's ledger card and enter the withdrawal on the customer's pass-book. It would have a verifying mark on it of some kind which would be an indication to the teller that it had been checked up by the sav-
127 ings teller and it would then be presented to the paying teller's window for cash. That usually requires the personal attention of the person who had the account or some authorized person. It could have been done by mail. The capital of the Manufacturers National Bank was $500,000, surplus $200,000 and approximately $47,000 of undivided profits at the time the bank suspended and there were reserves of six or eight thousand dollars. In stating on yesterday that when the Third National Bank required $750,000 put up and I deducted from that amount the amount as shown by the books of the bank which the building and furniture and fixtures were charged, it left $157,803 discarded assets. That is not the fact. The fact is that in that computation the capital, surplus, undivided profits and reserve accounts had all been wiped out so that the difference between the bank as it stood and as shown by its books and the offer of the Third National Bank was $1,500,000 and if one would

take out the amount at which the building and fixtures were carried the difference would be the discarded assets.

Q. Since you have been Receiver, had you had an opportunity of any kind to dispose of that building or convert it into capital?

Defendants object. Overruled. Exception.

A. I have not.

At the time Mr. Baty stated to the directors of the Manufacturers National Bank at the meeting that occurred about 11 o'clock June 12 that there was a contract between the Security National Bank and the Swedish-American Bank, Mr. Baty said that it depended upon a thorough examination of the assets of the Security National Bank by the representative of the Swedish-American Bank. When I stated on cross-examination that Mr. Baty when he first came to Rock-
128 ford on the 11th of June, 1931 and was told something of the condition of the Security Bank that he said to me "What will that do to you?" that conversation was in a room at the Faust Hotel in Rockford when Mr. A. R. Floberg, the President of the Manufacturers Bank was present.

Q. What did Mr. Floberg say, if anything, in reference to that question?

Defendants object as hearsay and not the best evidence. Overruled. Exception.

A. He said "I don't know" or substantially that. There is such a term used by bankers as "free cash". That means cash readily available, unpledged, either in hand or readily obtainable. When I stated on yesterday that the cash in banks and cash items of the Manufacturers Bank on June 12, or 13, amounted to $825,202.31, I have since that time broken down those items so that I can tell what they are.

Q. Can you tell the Court how much cash, free cash, the bank had on hand June 13, 1931?

Objected to as calling for the opinion and conclusion of the witness and not a statement of fact. Overruled. Exception.

A. Free cash, actual cash in bank, currency, gold, silver and government bonds and coupons which were termed as cash, $207,414.45; included in the item of $825,000 which I testified to on yesterday there was an item of $75,000 cash which was set aside as the examiner compiled the cash to cover uninvested trust funds.

Q. Did the Manufacturers Bank have $75,000 in uninvested trust funds?

Objected to as mere conjecture on the part of the witness. Overruled. Exception.

129 A. Yes, sir. The next item that was included in that cash referred to yesterday was an item consisting of miscellaneous items which were not certain $1096.30. That might be returned items from other banks, checks drawn against insufficient funds, it might be coupons cashed which were not due, it might be any number of items which were not readily convertible into cash. That was included in the total I gave yesterday. Another item called cash were items returned by the clearing house, $2797.94. This represents items returned by other banks because they would not pay checks which had been sent through the clearing house by the Manufacturers Bank. That was carried as a cash item on the books. They were not readily convertible into cash. Another item of uncollected clearings on Peoples Bank $5570.40. These items represent checks taken in by the Manufacturers Bank during business on June 13 which were put into the clearings and which were not paid as they ordinarily would have been on Monday, June 15, 1931, due to the inability of the Peoples Bank to pay their clearings. There was no actual cash or cash available from those items on June 13. This was included as a cash item by the bank and included in the amount mentioned yesterday. There was also an amount of $2977.81 uncollected clearings on the Security Bank which represented cash which was not available but was carried by the bank as a cash item and included in the total which I mentioned yesterday. There was a balance of Continental Illinois Bank, Chicago, $923.52. This was not readily available to the Manufacturers National Bank in Rockford on Saturday, June 13, but it represented actual cash that ought
130 to come to the bank in time. Another item due from the Continental Illinois Bank certificate of deposit for $250,000. That was carried as due from that Bank. Their certificates of deposit were pledged and held by the City Treasurer of Rockford to secure his account or accounts. There was nothing in that $250,000 item on which the Bank itself on June 13 could realize any cash. The certificate was physically out of the possession of the bank. The balance due from the Union Trust Company, of Cleveland, Ohio, of $294.05 was a balance due from the Trust Company to the Bank and when it could be gotten to Rockford it was available as cash. Item, balance reserve account $220,181.81 was due from the Federal Reserve Bank. Approximately $156,000 of notes had been rediscounted with the Federal Reserve Bank which had been forwarded to Chicago June 11 or 12. The returns from that had not been received by me. The

examiner in charge did receive advice as to what happened in Chicago after the bank closed. What happened was that $100,054.92 was actually accepted for discount by the Federal Reserve Bank and credited to the account of the Manufacturers Bank. The balance totaling approximately $56,000.00 consisted of other notes which were not accepted for discount by the Federal Reserve. They were held as collateral to the $100,000 credit which was given. When I stated on yesterday that there was $156,000 rediscounted, that was true as shown by the books of the bank but we had not received advice from the Federal Reserve Bank and if the bank had stayed open we would have got advice Monday or Tuesday and corrected that figure. To obtain the actual free cash in the Federal Reserve Bank, you would have to subtract $100,054.92 from the balance shown as due from the Federal Reserve Bank and that would leave approximately
131 $120,126.89 that was available when it could be got to Rockford from the Chicago Federal Reserve. Another item in the amount I gave is Federal Reserve Uncollected Funds $47,727.59. That sum represents items forwarded to the Federal Reserve Bank for collection and credit, but which were not available for immediate credit due to their being drawn on banks in foreign cities other than Chicago, and would be available only according to the availability schedule in the Federal Reserve Bank which states the number of days each item is available in cash in Chicago. The next item I included in cash in my testimony on yesterday was a balance due from National City Bank of New York, $2116.02. There was nothing against this and it being returned free cash when received from New York it would be available. This was also true of the Chase National Bank, New York, $7925.51. There was nothing against that cash and it would be free cash on arriving in Rockford. This is also true of the balance from Commercial Bank, St. Louis $868.57. There was nothing against this and it would be free cash when it arrived in Rockford. The same is true of the balance due from Second National Bank, Beloit, Wisconsin $308.27. That was available in cash when it was received in Rockford. To summarize my testimony there was free cash available to the Manufacturers Bank at the close of business on June 13, 1931 of $339,669.01, which was the total available cash according to those cash items. This is made up as follows: Balance
132 due Continental Illinois Bank, Chicago $923.52; balance due Union Trust Company, Cleveland $294.05; balance due National City Bank, New York $2,116.02; balance due

Chase National Bank, New York $7,925.51; balance due Commercial Bank, St. Louis $868.57; reserve balance at Federal Reserve Bank over and above rediscounts $120,126.89; actual cash in bank $207,414.45. Total $339,669.01. The bank held Government bonds to secure circulation of $200,000. These bonds had been pledged to secure outstanding circulation. They were pledged with the Treasurer of the United States. There was also $42,000 of United States bonds pledged to the Treasurer to secure postal savings. There was also United States bonds to the amount of $100,000 pledged to the Auditor of the State of Illinois to secure Trust Department. There were also $56,160 of United States bonds pledged with the State Auditor. There were also $161,800 of bonds pledged with the State of Illinois to secure state deposits. There were also bonds pledged with the Continental Illinois Bank & Trust Company amounting to $150,-861.87. These were pledged with the Continental Illinois Bank and Trust Company. There were $25,760 other bonds pledged to secure the Trust Department of the bank. There were other bonds pledged to secure a receivership account amounting to $7776.25. There were two bonds one for $5000 Cumberland County Power & Light 4½%, 1956 and $3000 Chile Copper Company 5% due 1947. This pledge was later held illegal. On June 13 they were earmarked and put away in the bank to secure a receivership deposit. Later, after the bank closed, the pledge was declared illegal. The bank held other bonds amounting to $34,760 book value pledged to secure the City Treasurer's account. They were Rockford 133 Improvement Bonds and Rockford Tax Anticipation Warrants. These were in a safety deposit box under the control of the Treasurer. The bank also held some defaulted bonds amounting to $3825.00. I would say that none of the defaulted bonds above referred to were available in cash on June 13, 1931. The bank had other bonds totaling a book value of $167,015.67. These were mostly special assessment bonds on property in Cook County, Illinois. There was a market value on those bonds and to the best of my knowledge the market value was approximately 40c on the dollar. I do not know the par value of the bonds. On June 13, 1931 the bank had no free bankers' acceptances. All of the bankers acceptances it owned were pledged to secure the City Treasurer's deposit. On June 13, 1931 the City Treasurer's deposit amounted to approximately $1,070,000.

Q. Do you know, on June 13, 1931, whether or not it be-

came known to the people generally outside of the banking circles that the Security National Bank was in trouble?

Objected to as speculative evidence. Overruled. Exception.

A. I do not think it was generally known outside of those who were in close touch with the banking conditions.

Recross Examination of the witness L. B. Achor conducted by Mr. Kenworthy, of counsel for defendants.

In this sheet, Defendant's Exhibit 5, showing the condition of the Bank at the close of business on June 13, 1931, the items to which I referred as having been termed cash items are those included in the resources of the bank as shown by this statement. Where bonds are referred to as having been pledged, those are the bonds which I have just testified about.

At the meeting on Sunday night, June 14, at which Mr.
134 Baty said that in order to effect a merger with the Third National Bank it would be necessary for the Manufacturers Bank to raise $750,000.00 in cash. He also said it was necessary that this cash be raised before the opening of the bank on Monday morning and what the directors said was that they were unable to raise $750,000 in cash or its equivalent by opening hours on Monday. When I was breaking down the cash items in the bank, I mentioned an item of $75,000 in cash that covered uninvested funds. What I meant was that there was an item in the Trust Department known as an escrow agreement which involved approximately that much money which was not at that particular minute determined whether it was cash or whether it was actually uninvested trust funds; but in order to play safe and be sure that it was covered it was designated as applying to the Trust Department to secure that amount of money. This was cash in the bank and under the control of the bank, but because the examiner was a little uncertain as to its character he segregated it from the other cash. The cash items amounted to $1096.00 as shown on this statement were items which might be collected the next day and might not, and they were not readily convertible, although they might be in 30 days or so, some of them might never be. They were carried as a part of the assets of the bank and were considered by the officers of the bank and myself as a part of the bank's assets. The item returned from the clearing house of $2797.94 were checks returned by the clearing house on June 13. They

represented items which did not go through in the regular course of business that day. The Peoples Bank cleared all its checks on June 13 and met all its obligations on that day.
135 The uncollected items on the Peoples Bank of $5570.47 represented checks on the Peoples Bank that the Manufacturers Bank had cashed on June 13, but did not attempt to clear until June 15. And the same is true of the uncollected items on the Security Bank of $2977.81. $250,000 certificate of deposit of the Continental Bank was pledged with the City Treasurer of Rockford so that it was available to that extent to reduce the liability of the Manufacturers Bank to the City of Rockford. The Manufacturers Bank had on deposit with the Federal Reserve Bank $220,181.81 and included in that item was an item of $100,000 that represented the proceeds of the rediscount of $156,000 worth of rediscounts. This was obtained on the 13th of June and there had been deposits in the Federal Reserve Bank prior to June 13 of approximately $120,181.00. This would make a balance of approximately $220,000 to the credit of the Manufacturers Bank in the Federal Reserve Bank but there are other items, debits and credits, which would be hard to arrive at a net amount. According to the statement of the Federal Reserve Bank, the credit of $100,000 was made by that bank on June 13 to the credit of the Manufacturers Bank. The transit account of $47,727.00 represents checks that had been sent for collection by the Manufacturers Bank to the Federal Reserve Bank and when the checks were collected that amount would be credited by the Federal Reserve Bank to the Manufacturers Bank. If the items cleared according to the schedule they would be available at the expiration of about six days from the date the checks were sent. If any of the checks were not collected they would be returned to the Manufacturers Bank. That is the common practice in which busi-
136 ness is conducted with the Federal Reserve Bank. When I testified as to the amount of free cash available on June 13, I did not take into consideration all or any part of the $47,727.59. I did not take into consideration all of the $220,181.81 balance in the Federal Reserve Bank. I only took into consideration the net difference amounting to $120,126.89. I estimated that the Federal Reserve Bank would refuse to pay out $100,000 and would attempt to set that off against the $100,000 that they had advanced for the rediscounts of the $156,000 worth of rediscounts. There was no written agreement between the Manufacturers Bank and

the Federal Reserve Bank relative to their right to set off other than the letter of transmittal when the rediscounts were sent to the Federal Reserve Bank. I haven't that with me and I am unable to find it. The $200,000 United States bonds that were deposited with the Treasurer of the United States to secure the circulation were at a premium on June 13, 1931. That premium was $5883.13. The building that was owned by the Manufacturers Bank was located at the southwest corner of Second and East State Streets in the City of Rockford. State street is the main street on the east side of the City. This bank building was eight stories high. I don't remember the exact dimensions of it. It runs from the street to an alley. It faces State Street and is approximately 150 feet deep and 60 feet wide. It is a modern, fireproof building, equipped with elevators and the stories above the ground floor were occupied by offices. I think the building was erected in 1927 and was a new building at that time fully completed and completely finished on all eight stories. I don't know that it was the most modern office building in the City of Rockford. I think there were others perhaps more modern. As I recall it the building was about half
137 rented. Concerning the Special Improvement Bonds and Village bonds that I have spoken of totaling $167,000, all I know of the market was that some of the brokerage houses in Chicago made a specialty of dealing in that kind of security. There was no market for those securities in Rockford. I discussed these bonds with some of the investment dealers in various offices in Rockford. There was not much of a market for unlisted bonds anywhere at that time. I don't know whether the market value of these bonds was affected at that time by the mix-up in the taxing situation in Cook County. When I spoke of defaulted bonds I meant that possibly the interest had defaulted and maybe the principal. That amount of defaulted bonds was only $3400. By bankers' acceptances I meant a written obligation signed by some maker and it is accepted or endorsed by a bank and is floated upon the market principally upon the strength of the endorsement or acceptance of the bank. Usually they are prominent outstanding banks over the country that make a habit of accepting paper of this character. What I mean is principally drafts that have the endorsement or acceptance of some bank guaranteeing the payment provided in the draft. All of the bankers acceptances which were purchased by the Manufacturers Bank were pledged to secure the City Treas-

urer's Account and they off set the City Treasurer's Account. In fact the collateral to the total city deposit was slightly in excess of the amount of the deposit.

The witness L. B. ACHOR, on redirect examination of Mr. Hall, counsel for plaintiff, testified:

At the meeting of the Manufacturers Bank Sunday night, June 14, when Mr. Leyburn, the Chief National Bank
138 Examiner for this District was present, I heard a conversation between the Directors of this Bank and Mr. Leyburn when Mr. Ekstrom was present. But I have told you all that I can remember of that conversation. There was a general discussion there as to whether the bank should be opened or not or whether it should be closed or not, I just can't recall. Some director thought the bank should be open. I think Mr. Ekstrom thought the Bank should be open the following morning. As I recall it he asked Mr. Leyburn if the bank was solvent if it should not open and Mr. Leyburn's quick remark was "You are a director of the bank, you should know more about it than we do; answer that yourself." Leyburn further said "I am telling you the bank is insolvent. If you open it you know the consequences." I remember Mr. Ekstrom said he believed the bank was solvent; that he did not believe it was insolvent and thought it could meet the ordinary demands upon it or that would be put on it on Monday morning. This conversation took place before the resolution was passed. I have the original or certified copy of the certificate of the Comptroller declaring the bank insolvent and appointing a Receiver of the Bank. The paper I produce which is marked Plaintiff's Exhibit 13 is that paper.

EXHIBIT 13 is offered in evidence.

The defendants object. Overruled. Exception.

I do not know to what extent the Manufacturers Bank Building was occupied on June 13. There were offices on each floor above the banking house on each side of a hallway.

Recross examination of the witness L. B. Achor by Mr. Kenworthy, Counsel for Defendants.

I cannot repeat the words that Mr. Leyburn used in his conversation with Mr. Ekstrom on Sunday night, June 14;

but I assume what he inferred was that the directors
139 would probably be held criminally liable if they opened the bank on Monday morning for receiving deposits when the bank was insolvent.

W. E. GUSTAFSON, a witness on behalf of plaintiff, in answer to interrogatories proposed to him by Mr. Hall, counsel for plaintiff, testified as follows:

I am connected with the Mechanics Universal Joint Company. I am Assistant Secretary and Treasurer and have been so connected for about two years and was so connected on June 12 and 13, 1931. I have been subpoened to bring here the cancelled checks drawn on the Manufacturers National Bank for June 12 and 13, 1931. I have them here. I produce a check dated June 12, 1931 against the Manufacturers National Bank and Trust Company which is marked Plaintiff's Exhibit 14. The signatures appearing on that check are Mr. Ekstrom's signature and my own and in my judgment the signature signed by Mr. Ekstrom is his signature. When the check was originally made there was a stub attached to it and at the same time a carbon copy was made. Plaintiff's Exhibit 15 which you hand me is a carbon copy of the check Plaintiff's Exhibit 14, and the stub which was originally attached to it. This was kept in our files. On the carbon copy there is typewritten the date 6-12-31 and transfer of cash $42,761.12. That same entry was made on the stub of Plaintiff's Exhibit 14 before it was detached. The figures in blue pencil "To Third National Bank" and the figures "31" and "A" have been added to the carbon copy since the transaction took place. And the notation Attorney Early has cancelled check has been added since and if you take all that goes on Plaintiff's Exhibit 15 below the perforated line and add it to Plaintiff's Exhibit 14, you would have a reproduction of the original with the exception ot this writing, you would have a reproduction of the typewritten part of the stub. That was on the original stub. I
140 have brought with me the sheets from the books of the Mechanics Universal Joint Company showing the amounts which its books show were on deposit in the various banks in Rockford June 12, 1931. That paper which I produce is the paper you have marked Plaintiff's Exhibit 17. The entries in that paper were made in June, 1931 at the different

dates shown on the paper. There has been no change since June 12, 1931. On June 12, 1931 there were checks drawn against this account which were outstanding, amounting to approximately $5600. No other checks were outstanding to my knowledge so that on June 12 when this check for $42,-761.12 was drawn there was outstanding against this account the amount of checks totaling $5600, or something like that. This paper shows our book balance. Some checks were outstanding but I do not know the number of checks. After examining other records I will say that checks outstanding as shown by this paper were $5,594.16. They were outstanding on June 12 in addition to the check for $42,761.12 which is in controversy in this suit. I do not know when this latter check cleared. On June 12, 1931 a check was drawn by the Mechanics Universal Joint Company on the Security National Bank for $35,000.00, and it was signed by me and I believe also by E. S. Ekstrom. The paper I produced is marked Plaintiff's Exhibit 18. When Plaintiff's Exhibit 14 came into my hands, it was placed on my desk and I signed it and turned it over to Mr. Ekstrom's desk. That is the last I saw of it. I do not know how the check was sent to the bank but my recollection is it went in the mail. I did not see it mailed. I do not know what happened to
141 the check after I left it on Mr. Ekstrom's desk. Plaintiff's Exhibit 18 was handled in the same way. I signed it and put it on Ekstrom's desk. I could not say whether Exhibit 14 and Exhibit 18 were executed at the same time or not. I probably knew that day but I have no recollection of it now. Judging by the numbers on the check, my judgment would be that I signed Exhibit 14 first. It would be impossible to say how long afterwards I signed Exhibit 18. I did not see Mr. Ekstrom sign either of them. They were not signed by him when I signed them. I do not know whether there were other checks presented to me at the same time and which I laid on his desk or not. I have forgotten. Exhibit No. 14 is numbered 15294. Exhibit No. 18 is numbered 15310. There was one check drawn by the Mechanics Universal Joint Company between check No. 15294 and Check No. 15310. That was drawn to R. L. Emmerson and while there is a gap in numbers on the checks, there was as a matter of fact only one check drawn in between. I got no orders to draw these checks. It is not my duty to draw them. I merely sign them and Mr. Ekstrom signs them. So far as my knowledge goes there was no order given to any one or

by any one that I know of to draw these checks. Exhibit 18 was the last check drawn by the Company on June 12. When a check is made out it is entered on the check register. There is attached to Plaintiff's Exhibit 15 a piece of paper which has been marked Plaintiff's Exhibit 20. That is the order by the bookkeeper to the stenographer to draw a check. I could not state when that was made. We have no way of showing when that order was made. I could not state when the rubber stamp markings on Exhibit 20 were made. It might have been done the day the check was drawn or the day after. The stamp that is on there bears no rela-
142 tion to the day of payment; and does not necessarily have relation to the date the order was made. I am not thoroughly familiar with that. It was under the direction of the bookkeeper, Mr. W. H. Stark, but I never paid much attention to it. The bookkeeper either orders a check made in writing or verbally. I don't know how the bookkeeper orders his stenographer to make out checks.

Plaintiff offers in evidence PLAINTIFF'S EXHIBITS 14, 15, 16, 17, 18, 18-a, 19 and 20.

The sheet which I now hand you is sheet known as Journal of Disbursements which immediately follow the one marked Exhibit 19. This sheet is marked Exhibit 21. That is a record of checks that were issued on the day set opposite each particular item. This is a book of original entries. It is in the same condition now as when made. That is also true of Exhibit 18-a and 19. Exhibit 18, in order of dates, was made first. Exhibit 19, was made second and Exhibit 21 third. They follow each other consecutively.

The witness GUSTAFFSON, cross-examined by Mr. Kenworthy, of Counsel for Defendants, testified:

The sheets that I produce marked Exhibits 18-a, 19 and 21 were not records kept by me. I made none of the entries on these sheets. Indirectly they were under my supervision, but they were directly under the bookkeeper's, Mr. Stark's supervision. None of the entries on Exhibits 16 and 17 were made by me. They were made by Mr. Stark. No part of Exhibit 20 was made by me. The handwriting on it looks like Mr. Stark's. I have no familiarity with the rubber stamp marking on Exhibit 20. I am familiar with the system that was employed by the Mechanics Universal Joint Company,

of preparing or of keeping blank checks during June,
143 1931. In order to eliminate the writing of a lot of checks,
we would issue a check with the exception of the amount when the first invoice came in for payment and enter upon that check, on the lower part of that check, the invoice date and the amount and as invoices came in for payment they would be entered on the lower part of the check in the invoice date and the amount and when the date of payment came due a check would be drawn for the full amount of all of the items appearing on the lower part of that check. By that I mean that the lower part of the check was a voucher and that explained the invoices for which the check itself was eventually drawn. These checks came to us in pads, consecutively numbered. The name of the bank on which the check is drawn was not printed on the check. At the time the body of the check itself was made out, we stamped in the bank on which it was drawn so our blank checks were all in one form and it was not known until the check was drawn out, that is, the body of the check itself, exclusive of the voucher, on what bank the check would be drawn. The bookkeeper determined on what bank the check would be drawn. I had nothing to do with that. To illustrate, if the Mechanics Universal Joint Company received an invoice from one of its customers on the first day of June that was not payable until the 15th day of June, upon receipt of that invoice a blank check would be drawn out from the pad and the bookkeeper would enter on the voucher portion of the check that invoice, but nothing would be done to the check itself at the time. And if, between the first of June and the fifteenth of June other invoices came in from the same customer, they would also be entered on the voucher and if the payment was to be made on the
fifteenth then the total of all the entries upon the voucher
144 would be figured and that amount, together with the
name and the date would be put on the check and a stamp would be made as to the bank on which the check was drawn. That was all done before the check was signed. In the illustration I gave, the check and the voucher would be filed away between the first day of June and the date when the check was made out, in the customer's file, or rather, in the accounts payable file. At the same time we made out an original voucher and check we also made out a carbon copy of the voucher and check and both the original and the carbon copy were filed in the accounts payable file. When the check was sent out the carbon copy was kept for our files.

By the Plaintiff: Exhibit 16 is withdrawn and all testimony concerning Exhibit 16 was ordered stricken by the Court. Exhibit 17 states at its head that it is a bank statement in account with the Manufacturers National Bank in the month of June, 1931. During the month of June, 1931 the Mechanics Universal Joint Company also did business with the Security National Bank, the Third National Bank, the Rockford National Bank and a savings account in the Peoples Bank & Trust Company in addition to the Manufacturers Bank. That is, the Mechanics Universal Joint Company was using for commercial accounts all of the banks above mentioned but the Peoples Bank & Trust Company. The accounts kept by the Mechanics Universal Joint Company during the month of June, 1931 with the Third National Bank are shown by Plaintiff's Exhibit 16, which has been withdrawn by the Plaintiff. The account kept by the Mechanics Universal Joint Company with the Rockford National Bank I produce and the same is marked Defendant's Exhibit 7; and the account with the Security National Bank is marked Defendant's Exhibit 8. DE-
FENDANT'S EXHIBITS 7, 8 and PLAINTIFF'S EX-
145 HIBIT 16 are offered by defendant and admitted by the Court.

MR. H. P. HELM, a witness produced by the Plaintiff, testified as follows:

I live in Rockford, Illinois and was Assistant Cashier and Note Teller of the Manufacturers National Bank and Trust Company at the time the bank suspended. I signed drafts, cashiers checks, certificates of deposit, certified checks and as note teller I performed the usual duties of a note teller, took charge of the notes, collateral and of note cage records. Since the suspension of the bank I have been employed by the Receiver as a clerk and am employed now. The sheaf of papers which you hand me and which are marked Exhibit 22, consisting of 18 slips of paper, are a list of checks in detail that came in on certain days, each ticket is dated and also cancelled, paid, on the same date and is a sum total of the checks charged to the account of the Mechanics Universal Joint Company, on the respective days. If one would take these checks in detail for any given date, the detail of checks as shown on this list would correspond to the totals shown on Plaintiff's Exhibit 3. In my employment with the Manu-

facturers Bank, I made all the entries in the books of the Winnebago Securities Corporation with the exception of the first entries when the company was organized, and I entered as note teller the items that went against the bank records as to the notes that were out of the bank and the checks given in payment for the notes.

Q. Can you tell the Court the total amount of paper, notes taken out of the bank and put into the Winnebago Securities Corporation?

The defendant objects on the ground that the testimony already in the record shows that the transactions between the Winnebago Securities Corporation and the Bank did
146 not make the bank insolvent. Objection overruled. Exception.

A. On December 26, 1930, approximately $398,000 worth of assets were taken out of the Manufacturers Bank and purchased by the Winnebago Securities Corporation by giving to the bank notes payable at various times in total amount of approximately $300,000, together with a check drawn by the Winnebago Securities Corporation on the Manufacturers Bank where they had their account in the amount of $98,000. I can produce a list of the notes that were formerly in the bank that were turned over to the Winnebago Securities Corporation. I handled these notes while they were in the Bank. I had tried to collect those notes while they were in the Bank. I had not been able to collect those notes.

Q. Do you have an opinion as to whether those notes were readily collectible or were they slow?

Objected to by defendant as immaterial and irrelevant. Overruled. Exception.

A. In my opinion these notes were very slow assets. I had seen the reports that the Comptroller sent to the bank after each examination beginning possibly around the latter part of 1929 and 1930 and 1931. When these notes were transferred by the bank to the Winnebago Securities Corporation, in addition to paying $98,000 they gave their notes to the bank and pledged the notes they had taken out of the bank as collateral. I kept the book records of the Winnebago Securities Corporation. The total amount of notes taken out by the Winnebago Securities Corporation was $397,919.96. Up to the time of the suspension of the Manufacturers Bank $5744.13 of these notes had been collected.

Q. At the time that the bank turned over the notes to the Winnebago Securities Corporation, were any of the signers of those notes then in bankruptcy?

147 Defendants object as not the best evidence. Overruled. Exception.

A. No.

Q. Since suspension, have any of those signers gone into bankruptcy?

Defendants object as immaterial and not the best evidence. Overruled. Exception.

A. They have. The Rockford Furniture Company has gone into bankruptcy and also the Excel Manufacturing Company. The Winnebago Securities Corporation had $25,000 of notes of the Excel Manufacturing Company and nothing has been paid on those notes. A. R. Floberg was the president of the Excel Manufacturing Company and also the president of the Manufacturers Bank. The Winnebago Securities Corporation also had some notes of the Al Carlson Manufacturing Company.

Q. Was the Al Carlson Manufacturing Company in the hands of a receiver and its property sold in the receivership?

Defendants object as immaterial and not the best evidence. Overruled. Exception.

A. Since suspension we received a dividend from the Al Carlson Manufacturing Company of $5952.93. On the total amount of notes held as collateral for the note of the Winnebago Securities Corporation the bank has collected $34,885.44. This includes a compromise that was made with the Rockford Desk Company of $12,500. The Winnebago Securities Corporation had a note in that batch of collateral from the Rockford Furniture Company of $18,000. We have received $4500.00 on that. In addition to trying to collect these notes, some of them were turned over to a lawyer to put in judgment.

The witness HELM, on cross examination, in answer to questions propounded by Mr. Kenworthy, Counsel for Defendant, testified as follows:

148 The total amount of notes given by the Winnebago Securities Company to the Manufacturers Bank was $299,919.96. To secure that note the Winnebago Securities Corporation pledged $397,000 worth of securities that had been taken out of the bank and at the same time the Winnebago Securities Corporation paid $98,000 in cash. Prior to the suspension of the bank, in addition to the $98,000 in cash the

Winnebago Securities Corporation paid $10,807.59 to apply on principal and interest and in addition to that in June, 1931, $50,000 was paid. That payment was to be used to take out additional notes in the files of the Manufacturers Bank and up to a certain amount and then the balance to be used to apply on the Winnebago Securities Corporation note. That is the way we credited it. I don't know anything about the original agreement between the Winnebago Securities Corporation and the Manufacturers Bank. Out of the notes that were applied as collateral there was collected prior to the suspension of the Bank $5744.13. That is the amount that the bank collected and since the bank has suspended there has been collected out of the collateral notes $34,885.44. The three notes given by the Winnebago Securities Corporation to the bank were all dated December 26, 1930. One was for $50,000, one was for $125,000 and one was for $124,919.96. The original note of $50,000 bears endorsements showing that on February 9, 1933 there was a balance due on that note of $6902.06, so that this $50,000 indebtedness had been reduced to that amount on that date. There had been paid on this $50,000 the sum of $43,097.94. The facts are that up to February 9, 1933 there had been paid $43,097.94 on the notes of the Winnebago Securities Corporation to the Bank, and the original indebtedness of the Winnebago Securities Corporation of $299,914.96 has been reduced to $256,817.02. Of the $50,000 paid into the bank by Mr. Thompson on June 12, 1931 for and on behalf of the Winnebago Securities Corporation, only $1602.12 has been applied on the records of the Winnebago Securities Corporation. The balance was applied by taking out assets of the Manufacturers National Bank and Trust Company of $48,397.88. I was directed to make these entries by Mr. Floberg or Mr. Achor. I know nothing about it except as I followed their directions.

149

The witness HELM, on direct examination, testified as follows:

Q. At the time that the original deal was made with the Winnebago Securities Corporation to take out certain assets of the bank, was it the understanding that there was to be $150,000 paid to the Bank?

Objected to by defendant. Overruled. Exception.

A. It was my understanding that there was to be paid into

the Bank the sum of $150,000 in cash. Instead of that there was $98,000 paid and a note from Adeline Thompson, who was the wife of the Chairman of the Board of the Bank, for $50,000. When the Thompson payment was made in June, it was made to take up that note of $50,000 which Adeline Thompson had made. The additional notes of the Manufacturers Bank was turned over to the Winnebago Corporation and these notes were then held as collateral security for the Winnebago Securities Company note.

On re-cross examination MR. HELM testified as follows:

It is my understanding that when the deal was made the Securities Corporation was to put in $150,000 in cash. It put up $98,000 in cash and a $50,000 note of Mrs. Thompson, which note of Mrs. Thompson, together with the securities taken out, were held as collateral by the Bank for the $299,000 note.

150 The witness H. A. CONKLIN, recalled as a witness for the plaintiff and in answer to questions propounded to him by Mr. Hall, testified further:

I was Secretary of the corporation known as the Manufacturers National Bank and Trust Company. The paper which you hand me, Exhibit 26, is a record that I made. There was a directors meeting held on December 12, 1930 of said Bank and Exhibit 26 is a true and correct record of the proceedings of that meeting. It was made up from notes I took at the meeting. Two sheets ahead of those meetings in Exhibit 26 will be found the authority to rediscount and borrow money on collateral. That is the resolution referred to in Exhibit 26. I was Secretary and Treasurer also of the Winnebago Securities Corporation. From the minutes you produce it appears that L. C. Miller, M. J. Henchler, Charles A. Thomas, Ardath Thompson and Hazel Lynn were elected directors of the Winnebago Securities Corporation. I know Mr. Henchler, Mr. Thomas and Mr. Miller. They are a law firm in Rockford.

The plaintiffs offers in evidence PLAINTIFF'S EXHIBIT 26 and in connection with that the resolution which appears two pages ahead, identified by the witness. The resolution is marked Exhibit 26-A. Admitted in evidence as Exhibits 26 and 26A.

MR. GUSTAFSON, recalled as a witness for the plaintiff, testified:

Exhibit 28 is an original sheet from the records of the Mechanics Universal Joint Company, a sheet kept in the ordinary course of business known as the sheet from the Journal of Disbursements. It is a record of checks issued by the Mechanics Universal Joint Company. Checks are dated on the day the check was finally issued and put in circulation. Referring to Exhibit 19, that appears to be a check to Elmer Strand, City Clerk, known as No. 15331 which purports
151 to be dated 6-16-31 and the check before that is dated 6-13-31, and the check below that is dated 6-13-31. I do not know how this happened to be. As to the other checks in this exhibit which appear to be dated 6-13-31 and some 6-15-31 and some 6-16-31, to the best of my knowledge those are the dates when the checks were passed out in circulation.

Plaintiff offers EXHIBIT 28 which is admitted. Also EXHIBITS 18-A, 19 and 21. Also EXHIBIT 22 and 22-A.

L. B. ACHOR, the plaintiff, recalled as a witness for the plaintiff, testified as follows:

When I was employed by the Directors of the Manufacturers National Bank and Trust Company in February, 1931, there were present H. A. Taylor, A. R. Floberg, Hugo L. Olson, F. F. Nelson, K. E. Knutzen and I think Mr. Ekstrom was there, I am not certain.

Q. What was said at that time with reference to employing you and what would be your duties?

Objected to by defendant as immaterial and irrelevant. Overruled. Exception.

A. Mr. Floberg said one office duty would be that I become President of the Winnebago Securities Corporation which will require some attention to liquidate collateral assets, etc. which have been taken out of the bank and placed in the Winnebago Securities Corporation. My other duties he said were to be fitting of the Vice President of any Bank with particular reference to attention to loans and discounts. After I was employed by the Bank I wrote various letters with reference to the Winnebago Securities Corporation notes, called them by telephone, had them come to the bank, asked them for se-

curity, I went out to their places of business, placed a
152 number of items in the hands of attorneys. In several cases judgment was taken. I know Ralph Thompson. I have seen Ralph Thompson with Exhibit 25 in his hands. E. S. Ekstrom was present at one time with him, Oscar Milburn at another and several of the directors at different times. At the time Mr. Ekstrom was talking to Mr. Thompson, I saw Exhibit 24 there. Thompson was reviewing it and asking Ekstrom questions about it. In that conversation Ralph Thompson listed the loans of the directors from the bank and he asked in substance of Mr. Ekstrom what the chances were of him paying his loan. I don't remember what Ekstrom said. He did not pay any of his loans. That was a few days after the first day of June, 1931. I would say Ekstrom and Thompson talked approximately thirty minutes. When I testified in my former examination as to an authority from the bank to rediscount and endorse or rediscount paper to the Federal Reserve Bank I had reference to the resolution which is marked here Plaintiff's Exhibit 26-A. All the paper that was passed on to the Federal Reserve Bank for rediscount about which I testified as endorsed by the bank.

Being further cross-examined by the defendant, the witness ACHOR testified as follows:

This talk that I testified to between Mr. Thompson and Mr. Ekstrom took place in the bank prior to the 12th day of June, 1931. Thompson was not a director of the bank. He was a son of the Mr. Thompson who has formerly been chairman of the Board. Thompson said it appeared to him that as the report sheet showed that 31% of the total loans and discounts were loans to certain of the directors and their concerns that one of the first places that the bank should look for assistance was the directors and their corporations. The Mechanics Universal Joint Company did not owe the bank any money.

There was no talk about how this 31% was arrived at.
153 On June 2, 1931, there was a savings deposit of the Mechanics Universal Joint Company in the Manufacturers National Bank and Trust Company of $10,000. That remained in the bank until the bank closed.

Plaintiff Rests.

DEFENDANTS' EVIDENCE.

W. H. STARK, a witness produced by defendants, in answer to interrogatories propounded to him by Mr. Kenworthy, of Counsel for defendants, testified as follows:

I live in Rockford and am bookkeeper employed by the Mechanics Universal Joint Company and have been such for fourteen years continuously. Was bookkeeper continuously during the month of June, 1931 for that company. My usual duties were to make out all statements for the company, monthly statements, check on invoices, approve them for payment and pay them on certain pay dates or in between dates whenever I deemed it necessary. These invoices were paid by check. Also it was a part of my duties to deposit money in whatever bank I saw fit or withdraw from any bank or draw checks on any bank. During the month of June, 1931 the Mechanics Universal Joint Company were depositing money and drawing checks against deposits in Rockford Banks as follows: The Security National Bank, Swedish-American Bank, Third National Bank, Manufacturers National Bank and Rockford National Bank. These were all located in the City of Rockford. I was the officer of the Mechanics Universal Joint Company who would determine where and in what bank the deposits would be made. I received no special directions from anybody when I made the various deposits. I used my own discretion as to where and in what bank to make deposits. I tried to keep the bank balances as nearly equal
154 as possible. With reference to my practice prior to June 13, 1931 as to transferring money from one bank of these five banks to another of the five banks, I would say we would get checks as high as forty, fifty or sixty thousand dollars from one customer and that would have to be deposited in one bank and naturally we would have to issue our check to transfer it to another bank. We did that right along. I was the person who determined when those transfers should be made. When our company received a check from its customer for a large amount of money I would put it in one bank and if the checks we had to draw would not reduce it to any considerable amount, we would issue our check for cash to transfer to another bank. All our checks were the same. They were all in the same form and prior to being made out they would not have the name of the bank on which they were drawn printed on them. During the month of June from June 1 to

June 15, the checks that we made out to pay our current obligations were made out in this manner—we had certain pay dates to pay checks, net invoices being paid the fifteenth of the month following. These were being drawn as the invoices were being listed, posted to accounts payable and listed on the bottom of the checks. Any checks drawn in between that were taken off the same pad. The day of payment of the net invoices for which we would receive invoices the first day of June or which in my opinion would be June invoices would not be paid until the fifteenth of July if it was a net invoice. The invoices that came in during May would be payable on the fifteenth day of June. And we would start making out the checks that we expected to issue to pay our May invoices on the first day of May. Plaintiff's Exhibit 18 which you
155 hand me is as to its printed form the general form of check that the Mechanics Universal Joint Company used during the month of June, 1931. It has a perforated line at the bottom of the check and below that a voucher. When we received an invoice that was payable on the fifteenth of June, we received that invoice during the month of May and if it was a net invoice, that is, not subject to discount, I would give this invoice to one of my girls and she would post it on the account payable sheet of our books and also make or draw a check and post the invoice on the bottom of the check, subject to more invoices coming in before the June pay date. The only part of the check proper that would be filled in would be the name of the payee and the date of payment. That is, if the invoice would be payable on the fifteenth of June we would date the check the fifteenth of June and this would be done during May and we would also write in the name of the payee. Then as the various invoices came in prior to the last day of May, these would be entered up on the invoice or voucher check below the perforation. I did not have charge of the payroll except the private payroll. The account in the Security National Bank was used for private payroll and the account in the Third National Bank was used for factory payroll during the month of June, 1931. It was part of my duties to maintain the balance of the payroll account to meet the payroll checks and the manner in which I did that was that the timekeeper would give me the total amount of the payroll for that period and I would issue a check for approxi-
156 mately that amount from our checking account in any bank to the payroll account in the Third National Bank. I have seen the check which you hand me that has been marked

Plaintiff's Exhibit 14 as well as Plaintiff's Exhibit 15 and a paper marked Plaintiff's Exhibit 20. Plaintiff's Exhibit 15 is a duplicate of Plaintiff's Exhibit 14. It was made at the same time. That is a record to be kept in our files as a record of the transaction. When Plaintiff's Exhibit 14 was issued, it had on it a voucher that does not appear there now. I have a recollection of the filling out of the check marked Exhibit 14. The check was filled out and typewritten by my stenographer, Miss McGuire. I ordered Miss McGuire to make out this check by writing her a note and Plaintiff's Exhibit 20 is the order that I gave to her for the preparation of that check. I gave this to her on June 12, in the morning of that day. Prior to delivering Plaintiff's Exhibit 20 to Miss McGuire, I had not had any conversation with Eric Ekstrom or any other officer of the Mechanics Universal Joint Company with reference to the drawing of a check for $42,761.12 or any other amount prior to issuing this order as shown by Plaintiff's Exhibit 20; nor had I received any communication in writing from any officer of the Mechanics Universal Joint Company with reference to the preparation of this check, Exhibit 14. Nobody but myself determined that this transfer was to be made and no communication was made to me concerning it by any one. My reason for issuing this check was only to transfer cash from one bank to another.

Q. Did you issue this order to your stenographer in the regular course of business as bookkeeper of the Mechanics Universal Joint Company?

Objected to by Plaintiff. Sustained. Exception.

157 I have a record of the amount of money that was on deposit in each of the five banks that the Mechanics Universal Joint Company did business with. I make up a daily bank balance. I have with me the original checks which were made out by me or under my supervision to pay the net bills of the Mechanics Universal Joint Company on the fifteenth day of June, 1931. I produce a bundle of 82 checks all bearing dates either the 13, 15 or 16 of June most of them bearing date the 15th of June, and all these were prepared under my supervision in the regular course of business of the Mechanics Universal Joint Company.

The Plaintiff objects to that portion of the question which includes "in the regular course of business." Objection sustained. Exception.

These checks in this bundle of checks were all made under my supervision during the months of May and June, 1931

and they were made to meet the net payments of the invoices which were payable on June 15, 1931. They were all signed and issued to the payees named therein, respectively. The name of the payee and the date were put in as each check was made. This was done by my stenographer under my supervision and when they were mailed they each had attached to them the invoice below the perforation at the bottom of the check proper. These all now appear to the removed. The payee keeps them for their reference so they would know what bills were paid by the check and the return checks with the invoices torn off were returned to us in the condition in which the bundle of 82 checks appears. All the checks in this bundle which bear date June 16, 1931 were issued in payment of freight bills. They are 7 in number and those 7 were made out on the 16th of June. The three checks in that bundle
158 dated June 13 were all payable to cash and drawn on the Third National Bank. Those were all made out on the 13th day of June and there were four checks, each dated June 15, 1931 which were made out on the fifteenth of June. Now the balance of the checks are all net checks and they were made out or written between May 1 and the last day of May, and the date of the check June 15 was put in at the same time as the pay date of the check. On all of these checks in this bundle I find a sticker pasted on to the checks containing the name of the bank on which they were drawn. By holding these checks up to the light I can see that these checks were originally drawn on the Security National Bank, Rockford, Illinois. The words "Security National Bank, Rockford, Illinois" were placed on those checks prior to June 15, probably on the Friday or Saturday before. All the checks in this bundle that are dated June 15 were mailed on that date. The reason why the sticker to the Third National Bank of Rockford, Illinois was pasted over the name of the Security National Bank that had been stamped on the check previous to the sticker was that the Security Bank did not open June 15, so we had stickers printed to draw them on another bank rather than write the checks all over again. The bundle of checks concerning which I have been testifying is the bundle of checks that has been marked Defendant's Exhibit 9.

DEFENDANT'S EXHIBIT 9 is offered by the defendant and admitted by the Court.

After I gave the direction shown by Plaintiff's Exhibit 20 to my stenographer, she returned to me Plaintiff's Exhibit 14 which did not at that time contain the signatures that now

appear thereon. I don't think I delivered this check to
159 Mr. Gustafson and Mr. Ekstrom for their signatures. I think my stenographer did. After the check was signed, I pinned a deposit ticket to it. I made out a deposit ticket and also a duplicate. Defendant's Exhibit 10 is a carbon copy of the deposit slip that I made out after the check was signed. This copy was made at the same time and by the same operation as the original deposit ticket with a carbon paper between the two. I attached the original deposit ticket to the check and I gave the check to my stenographer to mail. I gave this check to her on June 12, 1931. There was a practice in our method of business at the Mechanics Universal Joint Company as to when in the day checks for deposit would be mailed out. That practice was that the morning checks would go out by the eleven o'clock mail and the afternoon checks would be taken down to the post office by our mail boy at 4:30. I have no recollection of the time of day that I delivered plaintiff's Exhibit 14, to which was attached the deposit slip, Defendant's Exhibit 10, to my stenographer, whether in the morning or afternoon of June 12. At the time that I directed my stenographer to make out this check, plaintiff's Exhibit 14, I did not know anything about the condition of the Manufacturers Bank of Rockford. I had heard no rumors concerning it. The reason I made this check for $42,761.12 is that I tried to remember a check that I had deposited down there a few days before, a large check from one of our customers and I thought I remembered the amount. I have verified that since and I find that it was not made for the exact amount. My purpose in making out this check was to equalize the deposits in the banks to keep a little more in the Third National on account of our drawing our payroll on it. I had no other pur-
160 pose than the equalizing of deposits in the various banks in so doing. I gave my stenographer no special directions as to where to mail this check as she could tell from the deposit ticket where to mail it. Plaintiff's Exhibit 2 and Plaintiff's Exhibit 8 I have seen before. They are in my handwriting. I have no distinct recollection of the transaction. It was a matter of routine. The number on the deposit ticket indicates to me that this deposit slip Defs. Ex. 8 was made out before Plf's Ex. 2. Plaintiff's Exhibit 11 which is pinned to Plaintiff's Exhibit 8 contains figures prepared by me or under my direction. The deposit slip Plaintiff's Exhibit 8 was pinned to the checks which were going to the Third National Bank described in this deposit ticket. Plaintiff's

Exhibit 16 is a sheet where I kept the bank balances also notation of the outstanding checks. This sheet was prepared by me and in the course of my duties as bookkeeper of the Mechanics Universal Joint Company. It is a record of the balance of what was in the banks after drawing our checks. It shows the total drawn for the day against the deposits for the day and the balance. Plaintiff's Exhibit 17 is one of the record kept in the ordinary course of our business. It shows the deposits and the total of the checks drawn for the day and the balance with the Manufacturers National Bank. Defendant's Exhibit 8 is one of the records kept by me as bookkeeper of the Mechanics Universal Joint Company. It is a record showing deposits and total of checks drawn; also balance on hand in the Security National Bank. Defendant's Exhibit 7 is also one of the records of the Mechanics Universal Joint Company kept by me in the regular course of business. It is a record of deposits and total of checks drawn and the balance on hand in the Rockford National Bank. I had to do
161 with the withdrawals of savings accounts in the Manufacturers National Bank. That is, I was always along when any was withdrawn. When checks were drawn such as I have identified here, they were drawn against the Commercial account and not the savings account in the Manufacturers Bank. I have seen Plaintiff's Exhibit 18, a check for $35,000 drawn on the Security National Bank. I saw that on June 12, 1931; that was made out at approximately the same time as Plaintiff's Exhibit 14. It was all done on June 12, 1931 at substantially the same time. I do not seem to find in my files any order that I gave to the stenographer to make out the check which has been numbered Plaintiff's Exhibit 18. I have before me a record of the Mechanics Universal Joint Company which states the balance that the Mechanics Universal Joint Company had on deposit with the Security Bank of Rockford on the morning of June 12, 1931. On that morning they had a balance of $100,033.55. This is shown on Plaintiff's Exhibit 8. At the time the Mechanics Universal Joint Company had in its commercial account with the Manufacturers Bank on the morning of June 12 a balance of $63,244.30 and on the morning of June 12, 1931 the Mechanics Universal Joint Company had on deposit in the Third National Bank of Rockford in its commercial account a balance of $3838.71. That is shown by Plaintiff's Exhibit 16; and on the same morning of June 12, 1931 the Mechanics Universal Joint Company had on deposit with the Rockford National Bank in its commer-

cial account the sum of $10,834.71. I had no talk with any officer of the Mechanics Universal Joint Company with reference to my drawing the check for $35,000 shown by
162 Plaintiff's Exhibit 18. The reason I drew that check was to transfer $35,000 from the Security National Bank to the Rockford National Bank and my purpose was to equalize the balances in the bank. When I directed that check to be drawn, I had no knowledge of any kind of the condition or reputed condition of the Security National Bank of Rockford. After Plaintiff's Exhibit 18 was signed, I think I made a deposit ticket and pinned it on there. I do not have the original deposit slip or ticket but I have the duplicate of it. This is defendant's Exhibit 11. The rubber stamp marking which appears on Defendant's Exhibit 11 was not on there when I made it out.

DEFENDANT'S EXHIBIT 11, with the exception of the rubber stamp marking on the same, admitted in evidence.

When I made out the check, Plaintiff's Exhibit 18, and the deposit slip, Defendant's Exhibit 11, I made them out on the date that they each bear—June 12, 1931. After the check, Exhibit 18, was signed, I pinned the deposit slip thereon and gave them to my stenographer to mail. I remember when we got the stickers marked Defendant's Exhibit 9, the stickers bearing the words "To the Third National Bank, Rockford, Illinois, 70-40". We got those on the afternoon of June 15. Mr. Gustafson, the bookkeeper, had them prepared. When I made out the check, Plaintiff's Exhibit 18, and when I made out the checks in the bundle of checks marked Defendants' Exhibit 9, I expected those checks to all be paid through the Security National Bank. The balances that would be in the four banks, namely, the Rockford National Bank, the Third National Bank, the Manufacturers National Bank and the Security National Bank, after the checks in the bundle marked Defendant's Exhibit 9, and the checks marked Plaintiff's
163 Exhibit 14 and Plaintiff's Exhibit 18, if those checks had been paid as originally drawn would be as follows: Our balance in the Third National Bank would have been $34,537.86; in the Manufacturers National Bank $20,034.12; the Security National Bank $31,787.97, the Rockford National Bank $33,952.61. The amount I have just given in the Manufacturers National Bank does not include our savings account there. The amounts given above are the commercial balances, or balances in commercial accounts. By referring to the Exhibits before me, I can state what amount was deposited by the Mechanics Universal Joint Company to its commercial

account with the Manufacturers National Bank on June 6, 1931. That deposit was $44,617.21 and that made the balance of the deposit of the Mechanics Universal Joint Company in the Manufacturers Bank on June 6, 1931, $106,592.89. That is shown by plaintiff's Exhibit 17. When I drew the check for $42,761.12, Plaintiff's Exhibit 14, I had in mind the deposit of $44,617.21. That was deposited on June 6 and I had in mind transferring over to the Third National Bank that amount. I did not get the figures exactly right. Substantially the same only I have a "42" instead of a "44" and the figures are turned around. When I gave directions for the withdrawing of Plaintiff's Exhibit 14 I gave the figures to my stenographer from memory. Referring to the rubber stamp on the back of Plaintiff's Exhibit 20, I am familiar with that stamp and there was a custom or practice of the bookkeeping department with reference to stamping papers of that character in our plant during the month of June, 1931. The
custom was that after all checks are drawn, whether they
164 are invoices or what there is attached to the voucher, the
girl the following day the checks are drawn posts them to the ledger and after she is through posting she takes this stamp and stamps everything so that in case it comes loose from the voucher it will not be paid again. The posting would be done the day following the day the checks were drawn.

The witness W. H. STARK, being cross-examined, in answer to interrogatories propounded to him by Mr. Hall, testified as follows:

I am thirty-eight years old. Prior to June 31 had been bookkeeper of Mechanics Universal Joint Company for about ten years.

Q. What salary did you receive?

Objected to as immaterial. Overruled. Exception.

A. $225.00 a month. My desk was probably 100 feet away from the desk of the President, E. S. Ekstrom. He had a private office. I sat out in the open office. I cannot remember that I saw Mr. Ekstrom June 12, 1931. Could not say whether he was around the place or not. I remember I had no talk with him. I imagine I talked with Mr. Gustafson, Assistant Secretary, but I cannot remember anything that was said on June 12. Exhibit 20 is in my handwriting. I made that the morning of June 12. I could not tell you what time in the morning. All checks are supposed to be mailed

out from our plant in the morning. I also made out at the same time an order for the $35,000 check on the Security Bank. I don't know what has become of that. It may be around here some place among these papers but I have no explanation of why it is not pinned to the check. I have lots of duplicate checks and vouchers here. I find one here that has an order attached to it and the order is marked
165 Plaintiff's Exhibit 29. That check is dated June 16, 1931 and the order attached to it is stamped June 16, 1931. The date on which it is stamped is of no significance. Plaintiff's Exhibit 29 happens to be a check that I ordered drawn to take up a check in a hurry after the bank on which the original check was drawn was closed. I posted from Exhibit 29 at the same time that the check was drawn in order that my bank balance wouldn't show checks against two banks. Ordinarily, when banks are not in difficulty, the posting is done the following day and the stamp is placed after the posting is completed. I find one other check among a bunch of about 150 checks in the Courtroom which has an order attached to it. These are marked Plaintiff's Exhibit 30. Here the order for the check is dated the twelfth and the stamp on it is the thirteenth. I would say this check, Plaintiff's Exhibit 30, was issued in the morning. That would be our custom. That was issued to cover the cost of sending Liberty Bonds to Chicago. After Plaintiff's Exhibit 30 was issued three other checks were drawn and these three checks were put in circulation. Exhibit 30 is the fourth from the last check. Occasionally we issued checks in the afternoon. After check, Plaintiff's Exhibit 14, was drawn, I did not see it until after it was signed. I cannot say that I saw it after it was signed. When the check was drawn I made out a deposit slip. That was my business. I sent the original deposit slip with the check and kept the duplicate. I attached the original of the deposit slip to the check with a clip and turned it
166 over to my stenographer. That is, I put them on her desk which was right next to mine. At the time I ordered the check for $42,000 drawn on the Manufacturers Bank, I also ordered one drawn on the Security for $35,000.00. I imagine I ordered both at the same time. I made out tickets in the same way. We keep duplicates of each of those tickets. I cannot say, I was in no hurry when I ordered the check drawn on the Manufacturers Bank. I keep the books of the Mechanics Universal Joint Company. I cannot say where the sheet was showing deposits in the Manufacturers Bank on the 6th at that time. It may have been in the safe, I could

not say. The safe is thirty or forty feet away from my desk. I thought I remembered the exact amount of the deposit. I was in the habit of dealing with large amounts and had checks of large size. We had previous to that time, transferred money from the checking account of the Manufacturers National Bank to the Third National Bank. I cannot tell when that was done without referring to the records and I have nothing with me which would enable me to give you an answer on that. I find that previous to this transfer we had transferred money from the Manufacturers Bank to the Third National Bank, for payroll. I have here with me sheets beginning January 1, 1931 and including June 12, 1931 and during that interval I do not find that we had transferred any money from the General account of the Manufacturers Bank to the general account of the Third National Bank, although we had transferred money from the general account of the Manufacturers Bank to the Third National Bank payroll account. I cannot remember whether we had made
167 any transfer of an odd amount like this from one bank to another general account in another bank because I have no records here from which I can refresh my recollection. By odd amount I mean an amount like $42,761.12. I find no instance where we had made any transfer of odd cents or odd amounts from one bank to another. On June 10, 1931, the Mechanics Universal Joint Company had deposited in the Security National Bank $40,689.86. This deposit included 11 checks, the largest one for $38,256.42 from the International Harvester Company. The checks I had drawn on the Security National Bank and which we expected to put in circulation on the 15th amounted to $18,612.58. The total of that bundle of checks which is produced here adds up to $30,000 but among them is a check for $11,606.43 that does not have a sticker on it and was not originally drawn against the Security Bank. The Mechanics Universal Joint Company had a balance in the Security Bank, after withdrawing $35,000 of $50,400.00 and in the Third National Bank, immediately after we deposited Plaintiff's Exhibit 14, we had a balance in the Third National Bank of $47,790.75. That remained at that figure until the 16th and did not change. In the Rockford National Bank we had on deposit there just prior to the 12th of June $10,834.71 and after we deposited the $35,000 drawn on the Security we had $45,834.71. Our ordinary balance in the Rockford National Bank would run around twenty to twenty-five thousand dollars. While our balance at the time in the Rockford National was $45,000, I was drawing checks

on the Rockford National on the fifteenth and I knew I was going to draw these checks on the twelfth. Checks were in process of being made at the time. They totaled around
168 $11,000. These checks had been drawn before and I hand you the duplicate checks here. In the month of May we had a balance at the close of business in May in the Third National Bank of $4782.71 and in June prior to the day we made this deposit of $42,000 the largest balance we had at any time was $13,628.00. That was on the thirteenth of June and it remained $13,000 until the tenth when the balance dropped to $3600.00 and remained $3600 until we deposited this large check. Most of our checks from our customers come into us between the first and the fifteenth and some scattering collections came in later in the month. When these collections come in, we deposit them in whatever bank we choose and it was my aim to keep the deposit in the banks which we used somewhat equalized. In the month of June we started our balance in the Manufacturers Bank with $66,000 and maintained a balance of over $60,000 until the sixth of June and on the sixth of June we increased that balance to $106,000. We didn't equalize balances in the bank at that time because I had a lot of other work to do besides looking after the bank balances. Along about the middle of the month, when it came time to pay bills, I looked at the balances in the various banks. By making the transfers of $35,000 from the Security Bank to the Rockford National, and of $42,761 12 from the Manufacturers Bank to the Third National Bank, and by drawing the bundle of checks which I have produced against the account in the Security National Bank, the accounts in all Rockford banks made by the Mechanics Universal Joint Company would have been substantially equalized. During the month of May, 1931, we
169 started out our balance in the Manufacturers Bank with $21,000 and built that balance up on the fifteenth of May to $32,000 and from the fifteenth to the eighteenth we increased it to $57,000 and on the twenty-fifth it was $60,000. I don't know that we equalized our deposits during May. In May we withdrew $20,000 from the savings account in the Manufacturers Bank and deposited it to the general account in that bank. But the records that I have with me are not sufficient for me to go into very much detail about that.

At the request of appellee, it is ordered by the court that the following portions of the testimony of the witness be reproduced in exact words as follows:

Q. Did you have any reason for building up the bank bal-

ance in the Third National and the Rockford National higher than it had been carried for thirty or sixty days and reducing the balance in the Manufacturer's and Security Banks lower than they had been carried for sixty days on the 12th day of June, 1931? I am not asking whether you did it or not I am just saying did you have any reason for it?

A. Well, the Third National Bank account was down so low something had to be done.

Q. Anything else?

A. No.

On the twelfth of June our deposits in the Third National Bank were so low that something had to be done. I cannot tell you when the check that was sent to the Manufacturers Bank and the check that went to the Security Bank were sent out of our office that morning. If the mailman took it, it went in the morning. If it went out in the evening our mail boy took it to the post office. The mailman comes at 11:00 o'clock in the morning and it was customary that all checks mailed in the morning went on the 11:00 o'clock mail. That is my best recollection. If it does not go out then, the mailman comes again at two o'clock in the afternoon. If the mail goes out of our office at eleven o'clock, I presume it gets to the post office about noon or 12:30. If our boy takes it to the post office it would get there about ten minutes to five.

Redirect examination of the witness STARK conducted by Mr. Kenworthy, of counsel for defendants:

The Mechanics Universal Joint Company had a savings account with the Manufacturers National Bank on June 12, 1931 amounting to $10,000 and it was in the bank when the bank closed.

The witness STARK testified on recross examination as follows:

170 Along about the eleventh of December, 1930, the Mechanics Universal Joint Company had a balance of $100,000 in the savings account with the Manufacturers National Bank and we maintained that until December 19, when we reduced it to $75,000. I haven't the figures for that and I can't tell you definitely. During all the time in May and June

that I have been talking about, in addition to the deposit in the commercial account in the Manufacturers Bank the Mechanics Universal Joint Company had a savings account in that bank. They were separate and distinct accounts and at the time the bank closed there was about $10,000 in the savings account.

AGNES McGUIRE, a witness called by defendants, in answer to interrogatories propounded to her by Mr. Kenworthy, of counsel for defendants, testified as follows:

I live in Rockford, Illinois. I am a stenographer in the Mechanics Universal Joint Company and was such during the month of June, 1931. I worked under Mr. Stark. I was his stenographer. I have seen Plaintiff's Exhibit 20 before. First saw it on June 12, 1931 and in response to that Exhibit I typewrote a check of which Plaintiff's Exhibit 15 is a carbon copy and Plaintiff's Exhibit 14 is the original. At the time Plaintiff's Exhibit 20 first came to my hands, it bore no rubber stamp on it. I have a recollection of when Plaintiff's Exhibit 20 first came into my hands. I first saw it on the morning of June 12, 1931. It was in my file for miscellaneous checks to be typed on the morning of June 12. After I had typed the check I gave the original to Mr. Gustafson. It did not bear the signatures of either Mr. Gustafson or Mr. Erickson when I turned it over to Mr. Gustafson. I did not see Plaintiff's Exhibit 14 signed. I turned it over to Mr. Gustafson and
when I saw the check again, it bore the signatures of Mr.
171 Erickson and Mr. Gustafson. When I next saw the check
after I turned it over to Mr. Gustafson, it had attached to it the deposit slip, Plaintiff's Exhibit 2. I then put the check in an envelope and put it in the post box for the mailman to collect—that is, I mean the mail box in the building there. The envelope in which I enclosed it was addressed to the Third National Bank. The envelope was stamped when I mailed it. I think that I mailed it in the morning of June 12 before the eleven o'clock mail. Mr. Stark and Mr. Gustafson whom I have mentioned in my testimony are the same gentlemen who were witnesses in this case.

The witness AGNES McGUIRE, on cross-examination, in answer to interrogatories propounded to her by Mr. Hall, counsel for plaintiff, testified as follows:

My best recollection is that this order, marked Plaintiff's Exhibit 20, first came into my hands on the morning of June 12. I would say between nine and ten o'clock, and I drew the check right away. I drew a check on the Security Bank for $35,000 at about the same time. After they were both drawn, I gave them to Mr. Gustafson—that is, I laid them on his desk. I think I put both checks, Exhibit 14 and Exhibit 18, on his desk at the same time. As near as I can tell you, this was some time between nine and ten o'clock in the morning. I remember it. I don't remember whether Mr. Gustafson was at his desk at the time or not. Mr. Gustafson's desk is distant from my desk about the width of this room. I think there were other checks that I laid on Mr. Gustafson's desk at the same time. I usually have a bunch of miscellaneous checks. I don't remember whether included in that bunch was a check to R. L. Emmerson. I next saw the checks again in about
172 half an hour. When they came back to me Plaintiff's Exhibit 14 had a deposit slip attached to it and I addressed an envelope to the Third National Bank and at the same time I addressed another envelope to the Rockford National Bank, and I put Plaintiff's Exhibit 14 in the envelope addressed to the Third National Bank and Plaintiff's Exhibit 18 in the envelope addressed to the Rockford National. These were stamped envelopes, both alike. They had the return address of the Mechanics Universal Joint Company on them. I sealed the envelopes and put them in the mail box where the mailman collects the mail. As far as I can remember, this was before eleven o'clock in the morning. That is my best recollection. The mailman collected the mail at eleven o'clock. The mailman came again at two o'clock.

At the request of appellee, it is ordered by the court that the following portions of the testimony of the witness be reproduced in exact words as follows:

Q. Do you think you would know the envelope if you were to see it?

A. I would recognize the envelope, yes.

Q. I would like to have you look at Plaintiff's Exhibit 31, state if that is the envelope you sent that day to the Rockford National Bank?

A. It is the Mechanics Universal Joint Company envelope but whether it is the one I sent I don't know.

Q. Don't you know your own typewriting?

A. I don't know if I would recognize it or not.

Q. So far as you know you did not send any other mail of that size to the Rockford National did you, any envelopes of that size?

A. No as far as I know I did not.

Q. That is postmarked at 6:30 P. M. can you explain how that postmark got on there if it was mailed at 11?

Mr. Kenworthy: We object to that.

Court: She may answer.

Mr. Hall: The witness did not say she mailed this envelope, I am asking her.

Court: She may answer.

A. I can't explain unless it is some other stenographer's letter.

Q. When a stenographer got used to a typewriter, they write in a certain way don't they?

A. I don't know about that.

Q. Does that look like the typewriting you do?

A. It does a little. I generally put a comma after my first—

Q. First what?

A. First line.

Q. There is a comma after Rockford, isn't there?

A. Yes.

Q. Did you use that kind of an envelope that morning?

A. That was the envelope we had at the time yes.

Q. That is the kind you used that morning?

A. Yes.

Q. Did you see me put the check, Plaintiff's Exhibit 18, in that envelope?

A. Yes, sir.

Q. Is that about the way the check fit in that time you put it in?

A. Yes sir.

Q. Suppose you look at the envelope and look at the check, the typewriting on it. See if by an examination of it your recollection is at all refreshed?

A. It is the same kind of type.

Q. And it is the same kind of a ribbon, isn't it?

A. Yes. we have several Royal typewriters.

Q. It is written on the check about as it is written on the envelope, too, isn't it the same pressure? Is that right?

A. They look some alike, yes.
Q. Isn't that the envelope you sent that check in?
A. I can't say it was, it might be.
Q. You would not say it wasn't would you? Look at them both. You won't say this isn't the envelope you mailed that check in will you?
A. I don't know whether it is or not.
Q. After you have seen the envelope and compared it with the check, isn't it a fact you made that check late in the afternoon of the 12th?
A. No I think not.
Q. Do you have any independent recollection?
A. Yes I can recall the check.
Q. What time I mean?
A. I am sure it was in the morning.
Q. After you have examined the envelope you are still sure it was in the morning?
A. Yes sir.
Q. Do you know of any explanation, why that envelope should be marked 6:30 P. M.?
A. No, I don't.

173 ERIC S. EKSTROM, one of the defendants, called as a witness by defendant, testified as follows:

I am the same Eric Ekstrom who testified in this case for the plaintiff. I am one of the defendants to this suit. I have testified with reference to a meeting that was held in the office of the Manufacturers Bank at Rockford somewhere around noon on June 12, 1931. There were present at that meeting to the best of my recollection, Hugo Olsen, L. B. Achor, Oscar Milburn, A. R. Floberg, H. A. Taylor, possibly F. F. Nelson, but I am not positive, and myself. The meeting started at about eleven o'clock in the morning and it lasted until after twelve o'clock. Mr. Floberg called me up and asked me to attend the meeting. When I got to the meeting we asked Mr. Floberg what the purpose of the meeting was and he stated to us then that he had called Mr. Baty or the Chicago office of the Chief Examiner, I don't know which, to have a representative come out to see him as President of the Clearing House because of a certain conversation he had had with another gentleman in Rockford, and that Mr. Baty wanted to talk to us. I said "What does he want to talk to us about?" and he stated "No doubt about

the situation in Rockford, the banking situation in Rockford." I recall a remark that "I hope nothing happens as far as we are concerned. We are certainly solvent, aren't we?" To which Mr. Achor replied "We certainly are." I then stated "I have been away for a couple of days and I have got lots to do, can't we get a hold of Mr. Baty quickly?" To which Mr. Achor replid "Mr. Baty is no doubt very busy and I will try to get him on the 'phone" which he did and Mr. Baty came down very shortly after Mr. Achor had called him. Baty on arriving at the meeting stated the pur-
174 pose of the meeting asking that the board of directors or the members present give him authority to consult with a bank in Rockford regarding the possible merger taking in the Manufacturers National Bank and Trust Company. After some discussion we gave him that authority. The discussion was that there was to be a merger or combination between the Swedish-American Bank and the Security Bank of Rockford. In asking Mr. Baty for his reason for requesting authority to consult with a bank in Rockford, he stated that in his opinion after the merger between the Swedish-American National Bank and the Security National Bank there would no doubt be some disturbance in Rockford banking circules and that while he was about it we might as well clean up the situation and make stronger institutions and that was the reason he requested the authority to visit or consult with a bank in Rockford regarding a possible merger or taking over of the Manufacturers Bank and Trust Company. He further stated that he thought the Manufacturers National Bank and Trust Company, should there be a protracted run, would suffer very materially. That is about the extent of our conversation. I will add, after the meeting Mr. Baty, H. A. Taylor and myself had lunch at the Faust Hotel. During luncheon I asked Mr. Baty if he was positive that the merger between the Swedish-American and the Security would really be effected. He said "I have the contract in my pocket." We finished lunch about 1 or 1:30 P. M. and I went back to my office. Mr. Achor made general statements. and he stated that the bank was solvent. Nothing was said at that meeting by Mr. Baty or by Mr. Achor to the effect that whether or not the merger between the Security Bank
175 and the Swedish-American Bank was accomplished that the Manufacturers Bank would have to close on Monday if it did not effect a merger with some other bank. I heard nothing of that substance spoken that morning. The first time I heard that the Manufacturers Bank would likely not

open on Monday was on Sunday night, June 14. Concerning the meeting between a committee of directors of the Manufacturers Bank and the Third National Bank held in the banking house of the Manufacturers Bank on Saturday evening, which meeting lasted through until Sunday morning, I did not attend that meeting as an accredited member of the committee. About two o'clock on Sunday morning, I took some sandwiches and coffee in there and was there 25 or 30 minutes. There was no conversation between me and any of the persons gathered at that meeting with reference to the condition of the Manufacturers Bank. I heard nothing said at that meeting about the condition of the bank. On Sunday evening there was a meeting in the Manufacturers Bank. Mr Achor, Mr. Baty, Alfred P. Leyburn, Hugo Olson, H. A. Taylor, A. R. Floberg and myself were there. That meeting convened about 7:30 P. M. and lasted about an hour and a half. Both Mr. Baty and Mr. Leyburn addressed that meeting. Mr. Leyburn laid a prepared resolution on the table which he asked us to sign as directors of the Manufacturers National Bank and Trust Company, authorizing the Comptroller of the Currency to take charge of the Manufacturers Bank from that moment on. And he laid the resolution on the table for us to read. The resolution which he laid there was Plaintiff's Exhibit 6. When he laid it on the table it did not bear the signatures that appear to it now or the erasures there in the first line of the second paragraph. Leyburn
176 stated he wanted our signatures affixed to the resolulution. I stated I would not sign the paper. Leyburn replied "Why not?" I said "This bank is solvent and should remain open for more reasons than one." Then a general discussion took place among several of the members. Mr. Floberg stated he though the bank should remain open. Mr. Olson said he was opposed to signing the resolution so did Mr. Leyburn and Mr. Nelson. The others I don't remember. Leyburn stated the bank could not open on Monday morning. He said "You have too large an amount of frozen assets and too small a cash reserve." I said "We have got cash reserve". He said "All right, I will strike that out. Will you sign it now." And I said "No, I don't feel I should sign it." He then left the room. Mr. L. B. Achor said "For God's sake, we can't let him get out of here" and Mr. Achor went after him and he returned. Some one of the directors asked what would happen if we opened the bank in spite of his demand and he replied "The Comptroller of the Currency will hold each and every one of you liable for accepting deposits from here on." We then all signed it. I signed it that

night. Referring again to the meeting of June 12 at noon, in substance Mr. Baty stated that unless the merger between the Security and the Swedish-American was consummated and unless we merged and made a stronger institution that the banking situation would be bad in Rockford and he did not believe we could stand a protracted run. There was no talk at that meeting with reference to keeping the bank open on Friday or Saturday. The signature appearing on
177 Plaintiff's Exhibit 14 is my signature and also the signature appearing on Exhibit 18. I signed these on June 12. I have no recollection of the time of day I signed them. At the time I affixed my signature to plaintiff's Exhibit 14, I did not have any knowledge that the Manufacturers Bank of Rockford might not open at any time in the future. I had no idea that the Manufacturers National Bank was going to close. There was no idea or intention on my part in the signing of this check to effect a preference to the Mechanics Universal Joint Company for the amount of this check. I don't know whether I affixed my signature to Plaintiff's Exhibit 18 at the same time or a different time than the signature I affixed to Plaintiff's Exhibit 14 and I will explain why. Checks are laid on my desk every day, both morning and afternoon. The men in charge of the accounts are bonded. For me to sign a check is merely routine as an authorized agent of the Company. I have no recollection of whether Plaintiff's Exhibit 14 and Plaintiff's Exhibit 18 were signed before or after the meeting that I had attended at the bank on Friday morning, June 12. I have no recollection. My signing of these checks did not result from my information that I acquired at that meeting. I did not sign Plaintiff's Exhibit 14 in contemplation of the insolvency of the Manufacturers National Bank, nor was Exhibit 18 signed by me in contemplation of the insolvency of the Security National Bank. On June 12, 1931, I was not a stockholder in the Mechanics Universal Joint Company, except that I held a qualifying share—that is, the capital stock of the Mechanics Universal Joint Company is entirely owned by the Borg-Warner Corporation and I hold a qualifying share in that Company. That is my only interest in the Mechanics Universal Joint
178 Company. I was an officer of other corporations in Rockford on June 12, 1931. I was president of the Drop Forge Company; President of Forgings and Stampings Corporation and director in several others. I was a stockholder in Forgings and Stampings Corporation. I think I held 32 shares and I think I held 479 shares in the Drop Forge Com-

pany. That is, these shares were pledged but they were still in my name. I was president of both of these corporations. Both corporations maintained deposits with the Manufacturers National Bank during the month of June, 1931. I did not at any time during the month of June, 1931, prior to the 15th thereof, communicate any information that I had concerning the Manufacturers Bank to either of these corporations. I was a director in the Manufacturers Bank. Had a savings acount there and a commercial account and after this meeting on the 12th day of June I did not draw any of my money out of either the savings or the commercial accounts with the Manufacturers National Bank and made no attempts to draw any of my money.

The witness ERIC EKSTROM being cross-examined by Mr. Hall, testified as follows:

I owed the Manufacturers National Bank some money prior to June 12. When the bank closed my savings and commercial accounts were set off against my indebtedness there. After the set off I owed the bank something like $30,000. My stock in the Drop Forge Company was pledged at the time to secure a debt.

Q. Where was the capital stock pledged? Name the places.

Defendants object. Overruled. Exception.

A. Some of it was pledged to the Continental Illinois
179 Bank in Chicago. I think just 50 shares, as I recall it. Some of it was pledged with the Third National Bank at Rockford. I don't have the figures as to what I owed at the Third National Bank.

Q. What is your debt—for how much?

Defendants object. Overruled. Exception.

A. My debt at the Third National is contingent. I can't separate the notes which had signatures of six or seven other men of them. I think my direct obligations to the Third National were about $7,000. I don't know whether there was any equity in the stock that was pledged or not. None of it could be sold for its value at that time.

Q. How much was your salary in 1931 as President of the Mechanics Universal Joint Company?

Defendants object. Overruled. Exception.

A. $25,000.00 per year. I first heard that there was to be a meeting on June 12, shortly before the meeting. I went

down immediately after I was notified. All he said was that the directors were going to have an informal meeting. I don't recall that he said anything else. At that meeting Floberg stated that he had had a conversation with Mr. Truman H. Johnson, President of the Security National Bank in which Johnson had said that his bank was in some difficulty and Floberg said that he called Baty after he talked with Johnson. He did not say and I did not know that Johnson's bank was on the brink of insolvency. Statements were made that the Security Bank was in financial difficulties and I took it that the bank needed some assistance. I did not have in mind the contents of the Comptroller's letter to our bank of May 28, which said our bank was threatened with insolvency at the time of that meeting. I had no thought of what
180 was contained in that letter. There was no talk about the condition of our bank at that meeting prior to Mr. Baty asking for authority to discuss a merger with some other bank. When Mr. Baty came he said something about our frozen assets. I understood those to be the frozen assets that the Comptroller had mentioned in his letter. I knew, from the Comptroller's report, that the Comptroller claimed some of our assets were frozen. I knew that the Department claimed that $1,500,000 of our assets were frozen. All that Baty said at that meeting was that our cash position was such that we would not be able to stand a protracted run. He did not state that if the Security Bank was not taken over by the Swedish-American Bank it would not open its doors. He showed us a paper which he said was a contract between the Swedish-American Bank and the Security Bank with reference to a merger. That is he didn't show us the body of the contract but he showed us the signatures. Showed me this in the Faust Hotel, no, at the banking room in the Manufacturers Bank. None of the other directors were there at the time he showed it to me. He did not say that the contract was contingent upon valuing the assets. I did not know the terms on which the Swedish-American Bank was going to take over the assets. I thought the Security Bank stockholders were willing to turn it over for what they could get for it. I supposed that was a matter that was covered by the contract. Nothing was said about what would happen to the Manufacturers Bank in case the Security Bank did not open on Monday morning. At that meeting we signed an authority to Baty to consult with a bank in Rockford. As far as I knew, I had no knowledge of what bank he was going to talk to. There was a committee appointed at the June 12th

meeting to consult with the bank which Mr. Baty consulted. I did not attend a meeting on Sunday about one o'clock in the afternoon. If the minutes show that I was at that meeting, the minutes are wrong. I was never at a meeting where Mr. Olson moved that the committee appointed at yes-
181 terday's special meeting to represent the Board be given authority to negotiate and convey and sign any instrument or any contracts necessary. I heard on Saturday from Mr. Olson that there was to be a meeting at the bank on Saturday night between the committee we had appointed and a committee from the Third National Bank, he said they were going to value the assets, and I drove by the Bank at about two o'clock in the morning. Saw some lights in the bank and concluded if these men were working all night they might enjoy some sandwiches and coffee. Mr. Olson was with me. He had been with me all evening. Olson claimed to know who was in the bank. How he knew it, I don't know. When we went in there as I remember Mr. Achor, Mr. Floberg and H. A. Taylor and Mr. Conklin were there representing the Manufacturers and Mr. George Spafford, Harold Clark, Martin Kjelgren, Armor Johnson were there representing the Third National. They were working in the vault downstairs. I did not know until I got to the meeting Sunday night that according to the valuation of the assets by the committee of the two banks, the Third National Bank demanded $750,000 in cash in order to assume the deposit liability of the Manufacturers. I heard after I got to the meeting that according to the valuation the capital and surplus had been wiped out. I still thought the bank was solvent. At that meeting Sunday night I understood that the Security Bank would close down the next morning when we were told by the Chief Bank Examiner that our cash position was such that the Manufacturers Bank could not stand a run. They did not say that we could not stand a run for one day. I understood we had approximately $500,000 in cash. I signed this resolution Sunday night before I left the meeting. I would say it was 8:30 or 9 o'clock. I was angry at that meeting and perhaps you could say that I had a quarrel with both Mr. Baty and
182 the District Examiner and I did not apologize to any one and did not go back to the bank on Monday morning. When I signed those checks on June 12, I didn't pay any attention to the amount of them or to whom they were payable. I knew I signed the check, both the $42,761.12 check on the Manufacturers Bank and the $35,000 check on the Security but I paid no attention to the amount. I sometimes sign

checks in the morning and sometimes in the afternoon. I may have signed these checks on Friday afternoon. I don't have any recollection about the time I signed them. Leyburn said at the meeting on Sunday night that if we opened the bank on Monday we would be held criminally liable for all deposits accepted. I think in that meeting he stated that in his opinion that the bank was insolvent. I did not have charge of the bank and I don't know whether there has been any change in the position of the bank from what it was on Friday or not. So far as I knew there had been no particular change. Mr. Baty told me at the Faust Hotel on Friday noon that the Swedish-American Bank and the Security Bank would merge. He did not say that if the merger did not go through the Security Bank could not open. He said it was going through.

HUGO L. OLSON, a witness on behalf of the defendants, in answer to interrogatories propounded to him by Mr. Kenworthy, of counsel for defendants, testified as follows:

I live at Rockford, Illinois. I was a director of the Manufacturers National Bank and attended a meeting held at the Bank shortly before noon of June 12, 1931. A. R. Floberg, H. A. Taylor, E. S. Ekstrom, L. B. Achor, Oscar Milburn, Mr. Baty and myself were present at that meeting. I got to the meeting sometime shortly after eleven o'clock. A few
183 minutes after I arrived Baty came into the meeting. Before Mr. Baty called there was some conversation. I asked why we were called together. Some one said Mr. Baty wanted to talk to us. I remember some one asking L. B. Achor if he knew why we were being called and if we were to discuss our bank's condition and some one asked Mr. Achor if in his opinion our bank was solvent and he said "Yes, sir." I don't remember anything else that was discussed before Mr. Baty came to the meeting. When Baty came he said that a very bad situation had arisen in Rockford with reference to a certain bank, and that was the Security Bank and he said that a tentative contract had been drawn up with the Swedish-American Bank to merge with the Security National Bank, or take it over. He said in his opinion the announcement of this merger or take over would be announced in the paper Sunday and that in his opinion that would create a very bad situation in Rockford and a lot of nervousness, and no doubt it would bring a run on those banks that remained open.

Some one said to Mr. Baty that he did not think that would effect us, the Manufacturers National Bank, and that the run, if there was one, would be of short duration. Mr. Baty said we knew nothing about these runs, the department understood that situation much better than we did and the run might last for a long period and our cash position would not permit us, if the run lasted for a long period, to remain open. Some one said to Mr. Baty that in our opinion he did not understand the attitude of the depositors in Rockford and particularly those in the Manufacturers Bank. We did not believe that they would run like a flock of sheep but we were told we knew nothing about it. We did not have experience about these runs by Mr. Baty and the Department did. That is the gist of the conversation as I remember. Mr. Baty
184 further requested permission from the directors to see or call upon any bank in Rockford with the idea of merging the Manufacturers bank with this other bank. We told Mr. Baty we did not approve of that because it was a poor time for mergers and we would be allowed very little for our bank's assets. Mr. Baty said in his opinion a merger should be effected for the good of the banking situation in Rockford and finally we gave Mr. Baty authority to see a bank in Rockford and I think that I suggested that I would prefer he talked to the Third National Bank about a merger. That is the substance of the conversation so far as I can recollect. There was nothing stated at that meeting by Mr. Baty or Mr. Achor, or either of them to the effect that whether or not the merger was effected between the Security Bank and the Swedish-American Bank that the Manufacturers would not be able to open its doors on Monday. Nothing of that substance that I heard. Mr. Baty said we could put an embargo on our savings accounts and possibly in that manner remain open for some time but in his opinion this run was bound to last a long time and he did not think our cash assets would be sufficient to sustain a long time run. In substance Mr. Baty said that two banks on the east side and two on the west side of the river would be sufficient for Rockford. At that time there were five banks on the east side.

MR. OLSON, cross-examined by Mr. Hall, testified as follows:

At the present time there are two banks on the east side.

Q. How many are there on the west side?

Objected to by defendants. Overruled. Exception.

A. One. The Peoples Bank failed on June 15, 1931 and the Illinois Bank occupies its building. I don't know whether
I ever heard of the Illinois Bank before June 15, 1931.
185 A. R. Floberg called me to the meeting on June 12, 1931.
He was president of the Manufacturers Bank and he was also Chairman of the Clearing House. In title only I was Vice President of the Manufacturers Bank. I was not active in the management of the bank's affairs. I had been a member of the Loan Committee and attended many meetings of that Committee. I knew the assets of the bank. Baty said in substance at the meeting at noon on June 12 to the Directors assembled that the cash position of the bank was low, so that I understood our cash position was low. In substance he said the Security National Bank was in trouble. I don't recall that he said that if they weren't taken over by another bank they would not be able to continue business. Baty also said that he had a tentative contract between the Security Bank and the Swedish-American Bank and he said in his opinion it should without question be consummated, and that there would be a notice in the paper of a merger on Sunday morning and that it would create unusual excitement in Rockford and a run on the bank if it remained open. He did not say anything about the tentative contract being subject to the valuation of assets of the Security Bank. I understood that the merger would go through. I thought it was a firm contract. Didn't give any consideration to the word "Tentative." I presume I am interested in this case on trial. I did not understand on the morning of June 12, 1931 that the Manufacturers Bank, if it did not consolidate with the Third National Bank, might fail. On Saturday morning, about ten o'clock, the last day the bank was open, I transferred
$10,000.00 from that bank by telephone. I was President
186 of the Sundstrand Machine Tool Company and I transferred by telephone out of the funds of the Sundstrand Machine Tool Company in that bank to the First National Bank in Chicago $10,000. There is a suit pending here now against myself and the Sundstrand Machine Tool Company to try to make us put that $10,000 back. The basis of that suit is this meeting of the directors at eleven o'clock A. M. on the morning of June 12. I don't know what the basis of the suit on trial is. On Saturday morning, June 13, when I ordered this money transferred by telephone, I had not received any other or different information than I had received at the meeting held on June 12. Prior to that time on several

occasions I had transferred money out of the Manufacturers Bank. I had not talked to anybody concerning my testimony in this case. I was subpoenaed here by you as a witness for the plaintiff. I don't remember Baty using the words "Frozen assets" in his conversation on June 12. I thought half of our assets were in cash and I thought that would be sufficient to tide the bank over.

Q. Mr. Olson, on June 12, 1931, at the time of this meeting, how much money did you owe the bank?

Objected to by defendants. Overruled. Exception.

A. Around $11,000.00 of direct obligations.

Q. How much indirect?

Objection. Overruled. Exception.

A. I think it was upwards of $50,000.00.

A. R. FLOBERG, a witness for the defendant, in answer to interrogatories propounded to him by Mr. Kenworthy, of counsel for defendant, testified as follows:

I am the A. R. Floberg who was acting as President of the Manufacturers Bank prior to June 15, 1931. I remember
187 a meeting that was held in the office of the bank at Rockford about midday June 12, 1931. H. A. Taylor, Hugo Olson, Eric Ekstrom, Oscar Milburn, F. F. Nelson, K. E. Knudson, Mr. Baty, Mr. Achor and myself were present. Baty was not there when the meeting first convened. He came in afterwards. I don't think there was very much conversation before Baty came. After Baty came to the meeting Mr. Baty stated that a bank in Rockford was in difficulty and that he was arranging a merger. He stated later on it was the Security National Bank. He had every reason to believe that a merger could be effected through his assistance with the Swedish-American National Bank. He stated he was sure a merger or take over of some type was absolutely necessary because the Security Bank would not open. He stated he had in his pocket a contract signed which led him to believe that a merger was a certainty and that any disturbance in that section of the city would be taken care of through this merger which he was attempting to arrange. He went on to state to the members of the Board of the Manufacturers Bank who were there at this informal meeting that they should be primarily interested in quieting the banking situation in Rockford, Illinois. They should be glad to have a merger between

the Manufacturers National Bank and some other bank consummated because it would be the big and the public spirited thing to do. He said that bank disturbances were disastrous in the various communities where they occurred. He thought these men were big enough to see that and lend their assistance to any merger that could be consummated. Mr. Knud-

son said that he knew from his knowledge of the bank's
188 condition he was of the opinion that a merger was noth-

ing that was absolute necessary and that he was astonished to be called to a meeting where that subject was brought up. That he did not favor it. Mr. Olson stated that in his opinion a merger was not necessary or could it be very easily accomplished in his opinion. Mr. Ekstrom asked "What is the cash position of the bank?" He directed this question to me and I said that the cash position of the bank was such that we were continuing to meet all demands and that as far as I knew we were able to continue business. Mr. Baty repeated the statement that the Manufacturers Bank should be primarily interested in preserving a peaceful banking situation in Rockford. Regarding the conversation relative to giving authority to Mr. Baty to negotiate a merger with some other bank Mr. Olson stated that he wished to know definitely the position of the bank before he signed such an instrument. He inquired of Mr. Baty and inquired of myself and Mr. Taylor whether this bank was in a solvent position and the three people to whom he inquired all answered that it was. Mr. Olson stated in his opinion the chances for a merger were not good and he did not favor the signing of any papers that he did not think could be successfully carried out as far as the plans were concerned. Baty said he could be of a good deal of assistance to the board of the Manufacturers Bank provided he was given authority to approach some one who he had in mind. There was no resolution passed but there was a paper signed. Mr. Baty had the paper with him and we signed it. I have stated the substance

of all that took place at that meeting as I recollect it.
189 No such statement was made by Mr. Baty or Mr. Achor

at that meeting to the effect that whether or not the Security Bank was taken over by the Swedish-American Bank it would be impossible for the Manufacturers Bank to open its doors on the Monday morning following. The bank remained open all day Friday after that meeting and all of the Saturday following. To my knowledge it pursued its ordinary business on Friday and Saturday after that meeting. It met

all its obligations on those days and met all demands that were made upon it during those days.

The witness A. R. FLOBERG, on cross-examination, in answer to interrogatories propounded to him by Mr. Hall, counsel for plaintiff, testified:

I had been President of the Manufacturers Bank since January, 1930. Prior to that was Vice President for 3 or 4 years. While I was Vice President N. F. Thompson was the President, and in January, 1930 he became Chairman of the Board and I became President. Eric Ekstrom had been a director of that bank for 4 or 5 years and Hugo Olson for a longer period, probably 10 years. Olson and Ekstrom were both members of the Loan Committee. I conferred with them about once a month concerning the Loans of the bank. I was very friendly toward both of them and had been for a long time. The Manufacturers Bank pursued its ordinary course on Saturday, the 13th, in every way. I know it is alleged that some one took $1,000 that day out of one of the cages but I didn't know it. That was not a usual thing for the Manufacturers Bank to do. It had never happened before. I don't know that the deposits of the Manufacturers Bank dropped on Friday, the 12th. I know that the de-
190 posits dropped off on Saturday, they always did on Saturday and more often than not the deposits dwindled on Friday. It was a trend of the banking business for deposits to dwindle at about that time. It frequently happens that withdrawals exceed deposits of $200,000 or more from the first to the 12th of the month. When Ekstrom asked at the meeting on June 12 what the cash position of the bank was, I stated in round numbers the amount of money on hand to do business that we had. I can't remember now how much of the Bank's paper was protected. We had sent in $156,000 of our assets to the Federal Reserve Bank for rediscount that night, June 12th. I did not tell Ekstrom that we intended to borrow on our assets. I told him nothing more than I have stated. I told him that we had met all demands up to that time, and that so far as I knew we were in a position to continue business. Baty said that he and the Department had had experience with runs. He did not say that if there was a run on the banks in Rockford on Monday our bank would not be able to stay open the whole business day. He

did say in the presence of Ekstrom that our bank was not in a position to stand a run. I think L. C. Miller was present at that meeting. I had forgotten about him. There was a committee appointed to represent the bank in any negotiations that were had but it was my recollection that that was at another meeting. I attended a meeting the next day. Also attended a meeting on Sunday at about 1:15 o'clock. And on that Sunday a resolution was passed that the Committee appointed at yesterday's special meeting to represent the Board be given full authority to negotiate and communicate and sign any and all instruments, notes and other con-
191 tracts. I think we had a meeting also at one P. M. on Saturday. Our bank closed Saturday at 1:30 o'clock P. M.

Q. How much did you owe the Bank on June 12, 1931, at the time you had this meeting?

Defendants object. Overruled. Exception.

A. Direct obligation about $7,000.00.

Q. How much indirect?

Objection. Overruled. Exception.

A. I think a little in excess of $40,000.00.

Q. Did your family own the Excel Manufacturing Company?

Objection. Not proper cross-examination. Overruled. Exception.

A. We came into ownership in 1929. The Excel Manufacturing Company owed the Bank at that time.

Q. How much?

Objected to. Overruled. Exception.

A. A considerable sum, I can't remember what it was. About $65,000. I was interested as a partner in Rolling Green.

Q. How much did Rolling Green owe the bank at that time?

Objection. Overruled. Exception.

A. $30,000.00.

Q. Was that unsecured?

Objection. Overruled. Exception.

A. You mean as to collateral?

Q. Yes.

A. Yes.

MR. EKSTROM, recalled by Mr. Hall, on rebuttal testified as follows:

Along about June 31, I did not sign checks on account of the Rockford Drop Forge Company unless some of the other officers were absent. On my direct examination I stated that I owned one share of stock of the Borg-Warner Corporation.

Previous to June, I had owned more than that. I think
192 I owned 500 shares. They were all pledged for a debt.

On June 12, in addition to the one qualifying share that I owned, I also owned 500 shares which stood in my name but the same were pledged. This stock was of the par value of $10.00. I owned no stock in any of the affiliated companies of Borg-Warner. My entire stock in the whole thing was represented by 500 shares.

L. B. ACHOR, a witness called by the defendants, in answer to interrogatories propounded by Mr. Kenworthy, of counsel for defendants, testified:

I have produced the records of the Manufacturers National Bank and Trust Company showing the amount of the deposit in the commercial account that the Forgings and Stampings had with that bank on June 12, 1931. The amount of the deposit was $312.96. On June 12 only one check was drawn against that account. It was for $2.87. None was drawn after June 12. I have a record showing the amount of the savings deposits for the Forgings and Stampings Company with the Manufacturers Bank on June 12, 1931. That amounted to $5000. The records of the Manufacturers Bank show no withdrawal on June 12 or afterward from that savings account. I have the records showing the deposits of the Rockford Drop Forge Company in the commercial department of the Manufacturers Bank during the month of June, 1931. The amount of its deposits to the commercial department on June 12, 1931 was $18,530.02. The only withdrawals from that deposit was $1601.45 on the 13th and $187.49 on the 12th of June. That left a balance in the bank when the bank closed its doors of $16,928.57. The Mechanics Uni-
193 versal Joint Company maintained a savings account with the Manufacturers Bank in June, 1931. The amount on deposit on June 1, 1931 was $20,000. Of that amount $10,-

000.00 had been withdrawn on June 2 and $10,00 was the balance to that savings account when the bank closed. Eric S. Ekstrom maintained a savings deposit with the Manufacturers Bank in June, 1931. The amount of his savings deposits on June were $786.89. There were no withdrawals after the first of June, 1931 from that account. Eric S. Ekstrom had a commercial account with the Manufacturers National Bank and there was on deposit to his credit in that account on June 1, 1931, $1993.92. There was a withdrawal from that account on June 8, leaving the balance $1731.47 and that amount remained on deposit until the bank closed.

The witness L. B. ACHOR, on cross-examination, in answer to interrogatories propounded to him by Mr. Hall, counsel for plaintiff, further testified:

The card I produce marked Plaintiff's Exhibit 33 is a signature card upon which the Manufacturers Bank allowed withdrawals from the Forgings and Stampings account.

Defendants offer DEFENDANT'S EXHIBITS 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 all of which are admitted.

On page 323 of the transcript of the evidence, it appears that the offer of the Charter and By-laws of the Winnebago Securities Corporation was admitted by the plaintiff, the plaintiff offering only the charter and objection to the charter was overruled and the same was admitted.

And thereupon the defendant rested.

REBUTTAL.

194 L. B. ACHOR, a witness called by the plaintiff in rebuttal in answer to interrogatories propounded to him by Mr. Hall, counsel for plaintiff, testified:

I am the Receiver of the Manufacturers Bank of Rockford. Exhibit 33 is a signature card bearing the signature of the person who is authorized to sign checks of withdrawals on the savings account of the Forgings and Stampings, Inc. in the Manufacturers Bank and Trust Company.

The plaitiff offers in evidence PLAINTIFF'S EXHIBIT 33. Admitted.

MR. BATY, a witness called in rebuttal on behalf of the plaintiff in answer to interrogatories propounded to him by Mr. Hall, counsel for plaintiff, testified as follows:

I am the same M. R. Baty who testified on the witness stand before. I heard Mr. Ekstrom testify that I stated I had a tentative contract between the Swedish-American Bank and the Security Bank for the merging of those two banks on June 12. Exhibit 32 is the contract which I had. It is in the same condition now as it was then.

PLAINTIFF'S EXHIBIT 32 offered by plaintiff.

Objected to by defendant as immaterial and irrelevant.

Overruled. Exception.

WALTER E. BURWELL, a witness produced in rebuttal by plaintiff, in answer to interrogatories propounded to him by Mr. Hall, counsel for plaintiff, testified as follows:

I live at Rockford and was Executive Vice President of the Rockford National Bank in June, 1931. Have been connected with that bank 26 years. Shortly after June 12, 1931, I had a conversation with some one from the Mechanics Universal Joint Company with reference to a check for $35,000 that
195 had been drawn on the Security Bank and deposited in the Rockford Bank. I talked with Mr. Gustafson several times. I have a hazy recollection of talking with Ekstrom about the matter. The paper you hand me marked Plaintiff's Exhibit 31 is an envelope containing the return card of the Mechanics Universal Joint Company addressed to the Rockford National Bank. I have seen this before. At the time of the discussion about this particular check, I first saw it in the bank. I sent out to get all the available matter upon that subject together and this is the time I saw this envelope. At the time I talked with Gustafson he told me that that check was deposied in the post office or mail at 4:30 o'clock in the afternoon of Friday, June 12, 1931. The envelope is now in the same condition as it was when I first saw it.

CARL EKLUND, a witness produced by the plaintiff, on rebuttal, in answer to interrogatories propounded to him by Mr. Hall, testified as follows:

I was cashier of the Rockford National Bank in June, 1931. Shortly after June 12, 1931, I learned of a check that was claimed to have been sent to the Rockford National Bank for $35,000 drawn by the Mechanics Universal Joint Company on the Security National Bank, on or about June 12. I saw Mr. Gustafson talking to Mr. Burwell shortly after that time. I was called to the rail at Burwell's desk. I first saw Plaintiff's Exhibit 33 after Mr. Gustafson was in with reference to this item. It is in the same condition now as when I first saw it.

GUY JAMES, a witness produced by plaintiff, in answer to interrogatories propounded to him by Mr. Hall, testified as follows:

196 I was receiving teller of the Rockford National Bank in June, 1931. On June 13, 1931, in the morning of that day, I received a check for $35,000 from the Mechanics Universal Joint Company on the Security National Bank of Rockford, and I remember that shortly after June 12, 1931 there was some controversy with reference to that check. I have seen plaintiff's Exhibit 31 before. I first saw it on June 13, 1931 in the bank building in the wastepaper basket. It was taken from the basket on June 13. We looked for this letter and found it in a bale of paper. There was no other letter in that bale of paper for June 13, 1931. This is the only envelope of the Mechanics Universal Joint Company I saw. I brought that paper up and gave it to Mr. Eklund. It is in the same condition now as when I first saw it. Plaintiff offers PLAINTIFF'S EXHIBIT 31.

Objected to as immaterial. Overruled. Excepted.

Plaintiff rests.

216 PLAINTIFF'S EX. #1.

The Third National Bank of Rockford, Ill.

Sheet No. 21 Name Mechanics Universal Joint Co.,

Address General Acct.,

Proof	Date		Apr. 14, 1931	Checks in Detail		Date	Deposits	Date	New Balance
				Balance Brought Forward		Apr.	14 7,196.37	Apr.	14 7,196.37*
7,196.37	Apr.	17	629.04– 1						
6,567.33	Apr.	18	1,400.00–	1,813.70–		Apr.	18 12,463.80	Apr.	18 15,817.43*
15,817.43						Apr.	20 20,420.46	Apr.	20 36,237.89*
36,237.89	Apr.	23	23,000.00–					Apr.	23 13,237.89*
13,237.89						Apr.	28 2,475.72	Apr.	28 15,713.61*
15,713.61						Apr.	30 615.22	Apr.	30 16,328.83*
								Statement Apr. 30, 1931	
16,328.83	May	1				May	1 6,306.41	May	1 22,635.24*
22,635.24	May	5	196.13–					May	5 22,439.11*
22,439.11	May	11	20,000.00–					May	11 2,439.11*
2,439.11						May	12 1,092.27	May	12 3,531.38*
3,531.38						May	19 14,275.68	May	19 17,807.06*
17,807.06						May	21 660.51	May	21 18,467.57*
18,467.57						May	22 8,255.82	May	22 26,723.39*
26,723.39	May	26	22,000.00–					May	26 4,723.39*
4,723.39						May	28 59.32	May	28 4,782.71*
								Statement May 29, 1931	
4,782.71						Jun.	4 8,856.00	Jun.	4 13,638.71*
13,638.71	Jun.	9	10,000.00–					Jun.	9 3,638.71*
3,638.71	Jun.	13	21.24–			Jun.	13 1,390.92		
						Jun.	13 42,761.12	Jun.	13 47,769.51*
47,769.51	Jun.	16	15.00–					Jun.	16 47,754.51*
47,754.51	Jun.	16	75.00–	25.00–	80.00–				
	Jun.	16	102.80–					Jun.	16 47,471.71*
47,471.71	Jun.	17	38.25–					Jun.	17 47,433.46*
47,433.46	Jun.	17	11,606.43–					Jun.	17 35,827.03*
35,827.03						Jun.	17 64,138.43	Jun.	17 99,965.46*
99,965.46	Jun.	17	90.50–					Jun.	17 99,874.96*
99,874.96	Jun.	18	47.41	20.74–	.65–			Jun.	18 99,806.16*
99,806.16	Jun.	18	13.95–					Jun.	18 99,792.21*
99,792.21	Jun.	18	31.33–	68.04–				Jun.	18 99,692.84*
99,692.84	Jun.	19	.50–	1.47–	3.73–				
	Jun.	19	16.96–					Jun.	19 99,670.18*
99,670.18	Jun.	19	2.37–	17.25–	51.57			Jun.	19 99,598.99*
99,598.99	Jun.	19	31.75–			Jun.	19 1931	Jun.	19 99,567.24*

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Sheet No. 22

The Third National Bank of Rockford, Ill.
NAME Mechanics Universal Joint Co.,
Address General Acct.,

Proof	Date June 19, 1931		Checks in Detail			Date	Deposits	Date	New Balance
	Balance Brought Forward.....					Jun.	19 99,567.24	Jun.	19 99,567.24*
99,567.24	Jun.	20 4,272.27LS	1.29–	2.00–					
	Jun.	20 1.50–						Jun.	20 95,290.18*
95,290.18	Jun.	20 51.50–						Jun.	20 95,238.68*
95,238.68	Jun.	22 4.75–	22.92–	1.22–					
	Jun.	22 31,624.36LS						Jun.	22 63,585.43*
63,585.43	Jun.	23 88.07–	7,159.83LS					Jun.	23 56,337.54*
56,337.54	Jun.	24 985.01LS						Jun.	24 55,352.53*
55,352.53	Jun.	25 18,000.00–	480.40LS					Jun.	25 36,872.13*
								Statement Jun. 25, 1931	
36,872.13	Jun.	26 731.51LS				Jun.	26 1,838.25	Jun.	26 37,978.87*
37,978.87	Jun.	26 25.00–	60.00–					Jun.	26 37,893.87*
37,893.87	Jun.	27 21.03–						Jun.	27 37,872.85*
37,872.84	Jun.	29 10,000.00–	.75–	158.02–					
	Jun.	29 .65–	3.06–					Jun.	29 27,710.36*
27,710.36						Jun.	30 11,044.96	Jun.	30 38,755.32*
								Statement Jun. 30, 1931	
38,755.32	July	1 3.18–						Jul.	1 38,752.14*
38,752.14	Jul.	1 225.11–	132.81–	11.83–				Jul.	1 38,382.39*
38,382.39	Jul.	1 12.74–						Jul.	1 38,369.65*
38,369.65	Jul.	2 1,664.76LS						Jul.	2 36,704.89*
36,704.89	Jun.	2 120.56–						Jun.	2 36,584.33*
36,584.33	Jul.	3 3,972.79LS						Jul.	3 32,611.54*
32,611.54	Jul.	3 24.07–	29.13–			Jul.	3 10,559.80	Jul.	3 43,118.14*
43,118.14	Jul.	6 1,274.06LS						Jul.	6 41,844.08*
41,844.08	Jul.	7 2,844.14LS						Jul.	7 38,999.94*
38,999.94	Jul.	8 4.56–	1.47–					Jul.	8 38,993.91*
38,993.91	Jul.	9 3.08–	11.92–	12.65–				Jul.	9 38,966.26*
38,966.26						Jul.	9 12,038.19	Jul.	9 51,004.45*
51,004.45	Jul.	9 527.98–						Jul.	9 50,476.47*
50,476.47	Jul.	10 480.02–	4.53–	23,000.00–				Jul.	10 26,991.92*
26,991.92	Jul.	11 92.61–						Jul.	11 26,899.31*
26,899.31	Jul.	13 65.00–						Jul.	13 26,834.31*
								July 13, 1931	

218 PLAINTIFF'S EXHIBIT #2.

Deposited With
The Third National Bank,
Rockford, Ill.
By Mech. Univ. Joint Co.
6/12/31
All Items are Credited Subject to Payment

Right is reserved and the bank is authorized to forward items for collection or payment direct to the drawee or payor bank, or through any other bank at its discretion, and to receive payment in drafts drawn by the drawee or other banks, and except for negligence, this bank shall not be liable for dishonor of the drafts so received in payment nor for losses thereon.

	Dollars	Cents	Dollars	Cents
Corrency				
Gold				
Silver				
Checks	42,761	12		
			42,761	12

(4)

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219 PLAINTIFF'S EX. #3.

The Manufacturers National Bank and Trust Co., Rockford, Illinois.

Sheet No. Name Mechanics Universal Joint Co.

Address

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
					1931			
	Balance Brought Forward.....				Apr. 16	9,021.53		
	1931						1931	
	Apr. 16						Apr. 16	8,989.92*
8,989.92					Apr. 17	45,380.15	Apr. 17	54,370.07*
54,370.07	Apr. 17	4,895.69LS					Apr. 17	49,474.38*
49,474.38	Apr. 18	782.78LS					Apr. 18	48,691.60*
48,691.60	Apr. 20	5,629.21LS					Apr. 20	43,062.39*
43,062.39	Apr. 21	1,738.91LS			Apr. 21	1,062.50	Apr. 21	42,385.98*
42,385.98	Apr. 22	2,372.27LS					Apr. 22	40,013.71*
40,013.71	Apr. 23	334.20LS					Apr. 23	39,679.51*
39,679.51	Apr. 24	349.54LS					Apr. 24	39,329.97*
39,329.97					Apr. 23	9,087.40	Apr 23	48,417.37*
48,417.37	Apr. 23	458.10LS					Apr. 23	47,959.27*
47,959.27	Apr. 27	6.26–	74.20–				Apr. 27	47,878.81*
47,878.81	Apr. 28	9.90–					Apr. 28	47,869.91*
47,868.91	Apr. 28	10,498.66–					Apr. 28	37,370.25*
37,370.25	Apr. 29	129.16–	3.00–				Apr. 29	37,239.09*
37,239.09	Apr. 30	127.52LS					Apr. 30	37,111.57*
37,111.57	May 1	635.25LS					May 1	36,476.32*
36,476.32	May 2	4,092.93LS					May 2	32,383.39*
32,383.39	May 4	4,280.75LS					May 4	28,102.64*
28,102.64	May 5	5,727.89LS					May 5	22,374.75*
22,374.75	May 6	555.50LS					May 6	21,819.25*
21,819.25	May 7	605.92LS			May 7	167.19	May 7	21,380.52*
21,380.52	May 8	130.01–	74.54–				May 8	21,175.97*
21,175.97	May 9	105.43–	186.06–	13.03–			May 9	19,918.97*
	May 9	896.05–	56.43–				May 11	14,918.97*
19,918.97	May 11	5,000.00–						
14,918.97					May 11	28,021.33	May 11	42,940.30*
42,940.30	May 12	53.90–	84.00–	20.10–			May 12	42,702.30*
	May 12	80.00–						
42,702.30	May 13	4.21–					May 13	42,698.09*
42,698.09	May 14	104.17–	1,157.55–	19.32–			May 14	41,417.05*
41,417.05	May 15	413.71–					May 15	41,003.34*
41,003.34	May 15	9,894.24–					May 15	31,109.10*
31,109.10	May 16	101.14–	27.97–	10.00			May 16	30,969.99*
30,969.99	May 16	51.50–	62.15–		May 16	24,911.68	May 16	55,768.02*
55,768.02	May 18	14,167.25LS			May 18	5,000.00		
					May 18	20,000.00	May 18	66,600.77*
66,600.77	May 19	1,973.76LS					May 19	64,627.01*
64,627.01	May 20	5,443.88LS					May 20	59,183.13*
59,183.12	May 21	213.84LS					May 21	58,969.28*
58,969.29							May 21	58,969.29*
58,969.29	May 22	2,011.26LS					May 22	56,958.03*
56,958.03	May 23	323.10LS					May 23	56,634.93*
56,634.93	May 25	64.94–	.75–	1.00–			May 25	56,565.03*
56,565.03	May 25	3.21–			May 25	534.35	May 25	57,099.38*
57,099.38	May 26	15.00–	5.26–	3.19–			May 26	57,075.05*
	May 26	.88–						
57,075.05					May 26	4,163.00	May 26	61,238.05*
61,238.05	May 27	201.63–	17.59–	1.48–				
	May 27	25.70					May 27	60,992.35*

220 **PLAINTIFF'S EX. #3.**

The Manufacturers National Bank and Trust Co., Rockford, Illinois

Sheet No. Name Mechanics Universal Joint Co.

Address

Old Balance	Date	Checks in Detail			Date	Deposits	Date	New Balance
					1931			
	Balance Brought Forward				May 28	60,992.35		
	1931				1931		1931	
	May 28	75.30–	4.00–	1.03–				
	May 28	2.08–	1.99–				May 28	60,908.00*
60,908.00	May 29	10.34–	5.61–	2.41–				
	May 29	6.00–	.94–	32.28–			May 29	60,850.42*
60,850.42					May 29	2,928.61	May 29	63,779.03*
63,779.03	Jun. 1	154.14–	5.00–	70.00–				
	Jun. 1	20.00–	28.44–				Jun. 1	63,501.45*
63,501.45	Jun. 1	150.18–			Jun. 1	11,095.28		
					Jun. 1	10,149.61	Jun. 1	83,596.16*
83,596.16	Jun. 2	2,536.72LS					Jun. 2	81,059.44*
81,059.44	Jun. 3	1,160.26LS					Jun. 3	79,899.18*
79,899.18	Jun. 4						Jun. 4	79,107.87*
79,107.87	Jun. 5						Jun. 5	77,860.44*
77,860.44	Jun. 6	14,336.76LS					Jun. 6	63,523.68*
63,523.68	Jun. 8	127.82–	2.00–	92.84–			Jun. 8	63,301.02*
63,301.02					Jun. 8	44,617.21	Jun. 8	107,918.23*
107,918.23	Jun. 9	125.65–					Jun. 9	107,792.58*
107,792.58	Jun. 9	1.50–					Jun. 9	107,791.08*
107,791.08	Jun. 10	35,589.33LS					Jun. 10	72,201.75*
72,201.75	Jun. 11	224.70–	12.87–	5.50–				
	Jun. 11	19.04–					Jun. 11	71,939.64*
71,939.64	Jun. 12	12.13–	4.67–	64.29–				
	Jun. 12	21.38–	11.86–				Jun. 12	71,825.31*
71,825.31	Jun. 13	46,197.03LS					Jun. 13	25,628.28*

221 **PLAINTIFF'S EX. 4.**

Checks in Detail

From

Manufacturers National Bank and Trust Co.

Mechanics Universal Joint

6-13-1931

21.1
2,436.87
197.57
599.76
66.84 (Perforation)
96.46
14.86 PAID
42,761.12
46,195.26 6 13 31
1.77

46,197.63

222 PLAINTIFF'S EXHIBIT 5.

Clearings
from
Third National Bank
to
Manufacturers National Bank
Jun 13 1931

96.00	21.57	11.70	10,581.58**
1.00	9.50	2.62	10581.58
21.50	30.00	665.13	42761.12
52.98	60.00	5.99	93.85
7.00	5.00	47.17	3.35
10.00	2.00	35.55	52.30
33.55	33.82	6.13	23.75
50.00	2495.01	5.93	67.37
32.00	3.00	7.20	2.50
20.51	9.18	5.00	10.80
144.21	13.95	17.14	1.55
.81	47.15	9.90	5.00
8.58		11.69	1.05
9.65	4617.01**	20.40	
30.00		68.60	53604.22*
101.75	4617.01	19.81	
30.00	50.75	10.50	Jun 13 1931
2.00	10.00	9.59	
20.00	10.00	71.72	
2.00	18.75	51.03	
8.08	1.35	16.53	
4.50	2.28	4.28	
24.00	.50	1.47	
15.00	2.50	35.00	
26.00	5.00	118.41	
.60	4.00	194.00	
9.05	3.35	876.80	
8.00	35.46	7.52	
150.38	10.82	3.50	
23.50	1.06	11.85	
91.65	17.50	163.44	
9.84	182.64	12.27	
9.18	101.76	15.80	
1.90	85.00	5.38	
3.52	12.00	25.00	

29.60	101.00	12.80
106.07	37.75	2.41
.50	16.53	39.63
127.94	42.38	36.72
10.00	3.00	65.13
6.00	2.00	23.83
2.00	24.63	27.24
2.79	304.25	3.47
5.00	5703.27	1.50
10.00		75.00
2.80		142.31
..60		103.30
143.57		82.24
4.40	1618.29	5.56
247.06	27.75	
11.00	20.58	4872.91
100.00	4.55	5708.67
18.76	6.55	

223 PLAINTIFF'S EXHIBIT 6.

Letterhead of The Manufacturers National Bank and Trust Company

Rockford, Illinois

Special Meeting of the Board of Directors of The Manufacturers National Bank and Trust Company, Rockford, Illinois, Held June 14, 1931, at 8:05 o'clock P. M.

At a special meeting of the Board of Directors of The Manufacturers National Bank and Trust Company, Rockford, Illinois, held at the hour of seven o'clock P. M. on June 14, 1931 in its banking rooms in the City of Rockford, Illinois, the following resolution was upon motion duly adopted and approved;

Whereas: That due to frozen and non-liquid assets ~~and low cash reserves,~~ it is the opinion of the members of this Board convened that the interests of the depositors of this bank can best be preserved by suspending business and placing the affairs of this bank in the hands of the Comptroller of the Currency:

Now Therefor: Be it hereby resolved; that the business of this bank he suspended and placed in the hands of the Comptroller of the Currency.

Dated at Rockford, Illinois this 14th day of June 1931 and signed at 8:30 P. M.

A. R. FLOBERG
Director.
H. A. TAYLOR
Director.
B. A. WILSON
Director.
OSCAR J. MILBURN
Director.
HUGO L. OLSON
Director.
E. S. EKSTROM
Director.

224 PLAINTIFF'S EXHIBIT 7.

Special Directors Meeting Held 11 A. M. June 12, 1931.
Directors Present:

L. C. Miller
Hugo L. Olson
H. A. Taylor
A. R. Floberg
K. E. Knutson
F. F. Nelson
E. S. Ekstrom

Special meeting called by President Floberg to meet National Examiner M. R. Baty.

On motion of Director Hugo L. Olson, seconded by Director E. S. Ekstrom and carried unanimously, the following resolution was adopted:

Resolved: "That Examiner M. R. Baty be authorized to discuss our condition and assets with any other Bank in Rockford towards a sale or merger".

At the suggestion of Examiner Baty, the following Committee was appointed to represent the Board in any negotiations:

President A. R. Floberg
Directors L. C. Miller
Hugo L. Olson
H. A. Taylor and
Mr. Ralph E. Thompson and
Mr. L. B. Achor, Vice President.

There being no further business, the meeting adjourned. Motion for adjournment was made and duly carried.

.....
President.

L. B. ACHOR
Secretary Pro-Tem.

225 PLAINTIFF'S EXHIBIT 8.

Deposited With
The Third National Bank
Rockford, Ill.
By Mech Univ Joint Co.
6/12/31

All Items are Credited Subject to Payment

Right is reserved and the bank is authorized to forward items for collection or payment direct to the drawee or payor bank, or through any other bank at its discretion and to receive payment in drafts drawn by the drawee or other banks, and except for negligence, this bank shall not be liable for dishonor of the drafts so received in payment nor for losses thereon.

	Dollars	Cents	Dollars	Cents
Currency			7	00
Gold			269	80
Silver			87	50
Checks	36	36	68	36
	20	00	9	55
	9	07	5	00
	42	40	52	06
	7	62	6	00
	2	86		
	8	60	1390	92
	72	00		
	103	91		
	59	72		
	80	80		
	262	40		
(4)	112	50		
	16	87		
	3	93		
	11	91		
	34	70		

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226 PLAINTIFF'S EXHIBIT 10.

Third National Bank, Rockford, Ill.
June 13, 1931.

Banking House	$126,500.00
Capital Stock—Fed. Res. Bk.	27,000.00
Five per Cent Fund	7,500.00
Bonds and Securities Pledged	400,043.53
U. S. Liberty Bonds and Cert.	916,612.50
Bonds, Securities, Etc.	377,440.18
Bills Discounted	2,889,216.44
Overdrafts	466.03
Expense	17,839.56
Interest Paid	12,530.18
Earned Uncollected Interest	33,830.65
Stock Yards Nat. Bk.	4,726.86
First National Bank, Chicago	74,370.64
Cont. Ill. Nat. Bk. & Tr. Co., Chicago	18,799.43
Irving Trust Co., New York	24,519.43
N. Newark & Essex Bkg. Co., N. J.	4,238.26
Mississippi Valley Tr. Co., St. Louis	2,103.55
Federal Reserve Bank, Chicago	186,287.86
Federal Res. Bk. Uncollected Funds	81,220.26
Transit	4,826.83
Cash	389,735.66
Total	$5,599,827.85
Capital	500,000.00
Surplus	400,000.00
Profit and Loss	115,014.07
Interest Received	45,892.53
Premium	739.35
Rent	1,816.30
Investment Dept. Profits	410.15
Reserve for Interest	28,899.90
Reserve for Taxes & Insurance	3,151.76
Unearned Collected Interest	9,173.49
Circulation	150,000.00
Treas. of State of Ill.	25,000.00
Treasurer of the United States	5,000.00
Cashiers Checks	12,385.30
Certified Checks	26,787.05

Long & Short	122.60
Bank Deposits	282,702.02
Postal Savings	28,432.49
Savings Deposits	2,308,002.55
Certificates of Deposit	28,884.81
Individual Deposits	1,594,536.06
Dividends	76.20
Third Securities Corporation	1,704.35
Trust Dept. Funds	15,651.36
United States Post Office	15,245.51
Bond Purchase Account	200.00
Total	$5,599,827.85

This is to certify that this is a true copy of the daily balance sheet of the Third National Bank as of the close of business June 13, 1931.

(Signed) E. E. THOMPSON
Cashier.

227 PLAINTIFF'S EXHIBIT 11.

36.36*
9.07
42.40
7.62
2.86
80.80
16.87
34.70
269.80
87.50
68.36
656.34*
20.00*
72.00
59.72
262.40
112.50
3.93
7.00
537.55
537.55*
8.60*
103.91

11.91
9.55
5.00
52.06
191.03
6.00
656.34
537.55
1390.92
1390.92*
(4)

228 PLAINTIFF'S EXHIBIT 12.

Special Directors Meeting Held 1:15 P. M.
June 14, 1931.

Directors Present:

President A. H. Floberg — F. F. Nelson
Hugo L. Olson — L. C. Miller
E. S. Ekstrom — H. A. Taylor, together
K. E. Knuttson — with Ralph E. Thompson,
Vice President, L. B. Achor, Cashier, H. A. Conklin.

It was then moved by Director Olson and seconded by Director Eric S. Ekstrom and duly carried that the following resolution be adopted:

Resolved: "That the Committee appointed at yesterdays special, meeting to represent the Board, be given full authority to negotiate and consummate and sign any and all instruments, notes, or other contracts necessary."

Motion made and duly carried.

A. R. FLOBERG,
President.

L. B. ACHOR
Secretary Pro-Tem.

229 PLAINTIFF'S EXHIBIT 13.

Commission

No. 3952

TREASURY DEPARTMENT

Office of Comptroller of the Currency

Washington, D. C. June 16, 1931

Whereas, from incormation on file in this bureau, I am satisfied that "The Manufacturers National Bank and Trust Company of Rockford" located in the City of Rockford, County of Winnebago, and State of Illinois is insolvent and unable to pay its just and legal debts.

Now, therefore, I, J. W. Pole, Comptroller of the Currency, in pursuance of the power and authority vested in my by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks and for other purposes," approved June 30, 1876, do hereby appoint L. B. Achor, Receiver of "The Manufacturers National Bank and Trust Company of Rockford," with all the powers, duties, and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

In Witness Whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this Sixteenth day of June, A. D. 1931.

J. W. POLE
Comptroller of the Currency.

230 PS K

Certificate for Certified Copy.

Treasury Department
Office of the
Comptroller of the Currency } ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the paper hereto attached is a true and complete copy of the original commission of L. B. Achor as Receiver of "The Manufacturers National Bank and Trust Company of Rockford," Illinois dated June

16, 1931, and signed J. W. Pole, Comptroller of the Currency, and of the whole of such original on file and of record in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this eighth day of July, A. D. 1931.

F. G. AWALT
Acting Comptroller of the Currency.

Currency Bureau
Seal of the Comptroller
of the Currency
Treasury Department

Filed for record on the 20th day of July, A. D. 1931 at 11:54 o'clock A. M. No. 322637.

JOHN A. BOWMAN,
Recorder.

231 PLAINTIFF'S EXHIBIT 14.

Mechanics Universal Joint Company — Check No.
Division of Borg-Warner Corporation — A 15294
To The
Manufacturers Nat'l Bank — Rockford, Illinois June 12, 1931
Rockford, Illinois 70-43
Pay (4) $42,761.12
To The Order Of Mechanics U. J. Co. $42761.12 Cts.
Mechanics Universal Joint Company
MECHANICS UNIVERSAL JOINT COMPANY
(Perforated) E. S. EKSTROM
Paid *President.*
6 13 31 H. E. GUSTAFSON
A. Secy. Treas.

Endorsed on back as follows:

Pay To The Order Of
Third National Bank
70-40 Rockford, Ill. 70-40
Mechanics Universal Joint Co.
(Third National Bank
Paid
Through Clearing House
Jun 13 1931
Rockford, Ill.)

232 PLAINTIFF'S EXHIBIT 15.

Mechanics Universal Joint Company
Division of Borg-Warner Corporation
To The
Manufacturers Nat'l. Bank
Rockford, Illinois 70-43

Check No.
A 15294

Rockford, Illinois June 12, 1931

Pay
To The
Order
Of
Mechanics Universal Joint Company

$42,761.12

MECHANICS UNIVERSAL JOINT COMPANY
J
President
J
Secy. Treas.

Detach Check from Remittance Sheet Before Presenting
This check is in full of Account as Itemized Below No Receipt is Desired

Remittance Sheet

Mechanics Universal Joint Company Rockford, Ill.

Date of Invoice	Register No.	Description	Charges	Credits	Balance
6/12/31		Transfer of Cash	42,761.12		

PLAINTIFF'S EXHIBIT 16

Bank Statement. In Account with Third Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
Book Bal & Bank Bal are the same				Balance First of Month				*22,439.11
				1				
				2				
				3				
				4				
				5				
				6				
				7				
				8				
				9			*20,000.00	*2,439.11
				10				
				11		*1,092.27		*3,531.38
				12				
				13				
				14				
				15				
				16				
				17				
				18		*14,275.68		*17,807.06
				19				
				20		*660.51		*18,467.57
				21		*8,255.82		*26,723.39
				22				
				23				
				24				
				25			22,000.00	4,723.39
				26		59.32		4,782.71
				27				
				28				
				29				
				30				
				31				
				Totals				
						Checks Outstanding		
						Bank Balance		

*Indicates cancelled in original.

Plaintiff's Exhibit 16.

213

PLAINTIFF'S EXHIBIT 16

Bank Statement. In Account with Third Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS

Check Number	Amount √	Check Number	Amount √
15416	3.18 √	15572	50.68 √
262	1.00 √	573	109.49 √
522	29.13 √	574	135.00 √
502	774.53 √	575	75 √
697	3.08 √	576	99 √
579	9.61 √	577	179.58 √
269	480.02 √	578	4.53 √
270	262.64 √	580	16.46 √
332	11.47 √		
401	121.86 √		11,487.86
402	354.93 √	Book Bal	27,267.46
403	818.59 √		
432	527.98 √	Bank Bal	38,755.32
433	24.30 √		
434	177.16 √		
435	16.97 √		
468	4.18 √		
469	68.80 √		
470	120.56 √		
471	64.68 √		
472	4.50 √		
473	85.12 √		
491	3,434.88 √		
523	12.65 √		
524	11.83 √		
525	489.02 √		
526	225.11 √		
527	4.43 √		
528	1.25 √		
529	10.00 √		

BANK ACCOUNT

Day	Description	Deposits √	Checks √	Balance on Hand √
Balance First of Month				4,782.71
1				
2				
3		8,856.00		13,638.71
4				
5				
6				
7				
8				
9				
10			10,000.00	3,638.71
11		42,761.12		
12		1,390.92		47,790.75 √

530	33.52 √	13			
531	92.61 √	14			
532	1.47 √	15			
533	12.74 √	16		1,646.56	46,144.19
534	63.11 √			11,902.30	
536	9.26 √	17	64,138.43	18,612.58	77,767.74
537	23.52 √	18		91.13	77,658.61
504	132.81 √	19			
551	4.56 √	20		25,364.55	52,294.06
552	26.70 √	21		119.53	52,174.53
553	1,769.09 √	22			
554	32.87 √	23			
560	11.92 √	24		95.60	52,078.93
561	89.10 √	25		18,029.13	34,049.80
562	23.00 √	26	1,838.25	982.29	34,905.76
563	49.35 √	27		10,000.00	24,905.76
564	9.64 √	28			
565	1.95 √	29			
566	36.20 √	30	11,044.96	10,680.02	27,288.70
567	32.08 √	31	Corr.	21.24	27,267.46
568	7.16 √	Totals			
268	288.03 √		Checks Outstanding		
569	58.80 √		Bank Balance		
570	3.36 √				
571	24.07 √				

PLAINTIFF'S EXHIBIT 16

Bank Statement. In Account with Third Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
Book Bal & Bank Bal are the same				Balance First of Month				22,439.11
				1				
				2				
				3				
				4				
				5				
				6				
				7				
				8				
				9			20,000.00	2,439.11
				10				
				11		1,092.27		3,531.38
				12				
				13				
				14				
				15				
				16				
				17				
				18		14,275.68		17,807.06
				19				
				20		660.51		18,467.57
				21		8,255.82		26,723.39
				22				
				23				
				24				

25		22,000.00	4,723.39
26	59.32		4,782.71
27			
28			
29			
30			
31			
Totals			

Checks Outstanding
Bank Balance

Plaintiff's Exhibit 16.

PLAINTIFF'S EXHIBIT 16

Bank Statement. In Account with Third Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
15416	3.18	15572	50.68	Balance				
262	1.00	573	109.49	First of				
522	29.13	574	135.00	Month				4,782.71
502	774.53	575	75					
697	3.08	576	99	1				
579	9.61	577	179.58					
269	480.02	578	4.53	2				
270	262.64	580	16.46					
332	11.47			3		8,856.00		13,638.71
401	121.86		11,487.86					
402	354.93	Book Bal	27,267.46					
403	818.59			4				
432	527.98	Bank Bal	38,755.32					
433	24.30							
434	177.16			5				
435	16.97							
468	4.18			6				
469	68.80							
470	120.56			7				
471	64.68							
472	4.50			8				
473	85.12							
491	3,434.88			9				
523	12.65							
524	11.83			10			10,000.00	3,638.71
525	489.02							
526	225.11			11				
527	4.43					42,761.12		
528	1.25			12		1,390.92		47,790.75
529	10.00							

530	33.52	13			
531	92.61	14			
532	1.47	15			
533	12.74	16		1,646.56	46,144.19
534	63.11			11,902.30	
536	9.26	17	64,138.43	18,612.58	77,767.74
537	23.52	18		91.13	77,658.61
504	132.81	19			
551	4.56	20		25,364.55	52,294.06
552	26.70	21		119.53	52,174.53
553	1,769.09	22			
554	32.87	23			
560	11.92	24		95.60	52,078.93
561	89.10	25		18,029.13	34,049.80
562	23.00	26	1,838.25	982.29	34,905.76
563	49.35	27		10,000.00	24,905.76
564	9.64	28			
565	1.95	29			
566	36.20	30	11,044.96	10,680.02	27,288.70
567	32.08	31 Corr.		21.24	27,267.46
568	7.16	Totals			
268	288.03				
569	58.80				
570	3.36				
571	24.07				

Checks Outstanding
Bank Balance

215

PLAINTIFF'S EXHIBIT 16

Bank Statement. In Account with Third Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT					
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
Book Bal & Bank Bal are the same				Balance First of Month				22,439.11
				1				
				2				
				3				
				4				
				5				
				6				
				7				
				8				
				9			20,000.00	2,439.11
				10				
				11		1,092.27		3,531.38
				12				
				13				
				14				
				15				
				16				
				17				
				18		14,275.68		17,807.06
				19				
				20		660.51		18,467.57
				21		8,255.82		26,723.39
				22				
				23				
				24				

25				4,723.39
26				4,782.71
27				
28				
29			22,000.00	
30				
31				
Totals		59.32		

Checks Outstanding
Bank Balance

PLAINTIFF'S EXHIBIT 16

Bank Statement. In Account with Third Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
15416	3.18	15572	50.68	Balance				
262	1.00	573	109.49	First of				
522	29.13	574	135.00	Month				4,782.71
502	774.53	575	75					
697	3.08	576	99	1				
579	9.61	577	179.58					
269	480.02	578	4.53	2				
270	262.64	580	16.46					
332	11.47			3		8,856.00		13,638.71
401	121.86		11,487.86					
402	354.93	Book Bal	27,267.46					
403	818.59			4				
432	527.98	Bank Bal	38,755.32					
433	24.30							
434	177.16			5				
435	16.97							
468	4.18			6				
469	68.80							
470	120.56			7				
471	64.68							
472	4.50			8				
473	85.12							
491	3,434.88			9				
523	12.65							
524	11.83			10			10,000.00	3,638.71
525	489.02							
526	225.11			11				
527	4.43					42,761.12		
528	1.25			12		1,390.92		47,790.75
529	10.00							

530	33.52	13			
531	92.61				
532	1.47	14			
533	12.74				
534	63.11	15			
536	9.26				
537	23.52	16		1,646.56	46,144.19
504	132.81			11,902.30	
551	4.56	17	64,138.43	18,612.58	77,767.74
552	26.70				
553	1,769.09	18		91.13	77,658.61
554	32.87				
560	11.92	19			
561	89.10				
562	23.00	20		25,364.55	52,294.06
563	49.35				
564	9.64	21		119.53	52,174.53
565	1.95				
566	36.20	22			
567	32.08				
568	7.16	23			
568	288.03				
569	58.80	24		95.60	52,078.93
570	3.36				
571	24.07	25		18,029.13	34,049.80
		26	1,838.25	982.29	34,905.76
		27		10,000.00	24,905.76
		28			
		29			
		30	11,044.96	10,680.02	27,288.70
		31	Corr.	21.24	27,267.46
		Totals			

Checks Outstanding
Bank Balance

Plaintiff's Exhibit 16.

233 PLAINTIFF'S EXHIBIT 18.

Mechanics Universal Joint Company
Division of Borg-Warner Corporation

Check No.
A 15310

To The
Security National Bank
Rockford, Illinois 70-48

Rockford, Illinois June 12, 1931

Pay $35,000.00

To The
Order
Of
Mechanics Universal Joint Co.

MECHANICS UNIVERSAL JOINT COMPANY
E. S. EKSTROM
President.
H. E. GUSTAFSON
A. Secy. Treas.

Detach Check From Remittance Sheet Before Presenting
This Check Is In Full Of Account As Itemized Below No Receipt Is Desired

Remittance Sheet

Mechanics Universal Joint Company Rockford, Ill.

Date of Invoice	Register No.	Description	Charges	Credits	Balance
6/12/31		Transfer of Cash	35,000.00		

Pain Through
2 Clearing House 2
Or
Pay To The Order Of
Any Bank, Banker Or Trust Co.
Prior Endorsements Guaranteed
Jun 15 1931
The Rockford National Bank
Rockford, Ill.
C. H. Eklund, Cashier
70-41 70-41

Endorsed on back:

Pay To The Order Of
The Rockford National Bank
70-41 Rockford, Ill. 70-41
Mechanics Universal Joint Co.

51 Mechanics Machine Co.
Rockford, Illinois

Pay to the Order of	Amount of Check	Discount	Accounts Payable	Date	Check No.
Forward	57,735.11	110.75	15,084.74	.....	.....
R L Emerson √	88.07 √	.....	.....	6/12/31	15295 √
Mechanics Universal Joint Co √	35,000.00 √	.....	.....	6/12/31	15310 √
Total	**92,823.18**	**110.75**	**15,084.74**	.....	.....
Previous Total	83,922.10	113.86	9,571.87	.....	.....
Total to Date	**176,745.28**	**224.61**	**24,656.61**	.....	.....
Cash	25.00	.....	.....	6/13/31	15333
Cash	80.00	.....	.....	6/13/31	15334
Cash	75.00	.....	.....	6/13/31	15335
Frank Smith	65.00	.....	.....	6/13/31	15362
Total	**245.00**	.....	.....	.....	.....
Previous Total	176,745.28	224.61	24,656.61	.....	.....
Total to Date	**176,990.28**	**224.61**	**24,656.61**	.....	.....
Cash To Cancel Check	25.00	.....	.....	6/13/31	15333
Cash Do	80.00	.....	.....	6/13/31	15334
Cash Do	75.00	.....	.....	6/13/31	15335
Frank Smith Do	65.00	.....	.....	6/13/31	15362
Total	**245.00**	.....	.....	.....	.....
Previous Total	176,990.28	224.61	24,656.61	.....	.....
Total to Date	**176,745.28**	**224.61**	**24,656.61**	.....	.....
Elmer Strand City Clerk √	38.25 √	.....	38.25 √	6/16/31	15331 √
Cash √	25.00 √	.....	.....	6/13/31	15333 √
Cash √	80.00 √	.....	.....	6/13/31	15334 √
Cash √	75.00 √	.....	.....	6/13/31	15335 √
Cash √	90.50 √	.....	90.50 √	6/15/31	15398 √
Postmaster √	15.00 √	.....	.....	6/15/31	15399 √
Ralph Ebert √	102.80 √	.....	.....	6/15/31	15400 √
Postmaster √	16.96 √	.....	16.90 √	6/16/31	15408 √
Illinois Central R R Co √	6.12 √	.....	6.12 √	6/16/31	15409 √
National Freight Company √	.65 √	.....	.65 √	6/16/31	15410 √
C B & Q R R Co √	20.74 √	.....	20.74 √	6/16/31	15411 √
C & N W R R Co √	47.41 √	.....	47.41 √	6/16/31	15412 √
C M St P & Pac R R Co √	1,128.13 √	23.02	1,151.15 √	6/16/31	15413 √
Interstate Iron & Steel Company √	838.19 √	16.97	855.16	6/16/31	15415 √
Rockford National Bank √ (Hyatt Roller Brg & Belw. Sons Mach)	113.18 √	2.31	115.49 √	6/15/31 √	15336 √
Armour & Company √	33.17 √	.68	33.85 √	6/15/31	15337 √
American Felt Company √	7.48 √	.15	7.63 √	6/15/31	15338 √
American Optical Company √	119.34 √	2.43	121.77 √	6/15/31	15339 √
Aetna Ball Bearing Mfg Co √	20.31 √	.21	20.52 √	6/15/31	15340 √
W D Allen Manufacturing Co √	5.94 √	.06	6.00 √	6/15/31	15341 √
Amco Sales Corp √	253.81 √	5.17	258.68 √	6/15/31	15342 √
Armstrong Cork Company √	24.64 √	.77	25.41 √	6/15/31	15343 √
American Insulator Corporation √	22.77 √	.23	23.00 √	6/15/31	15344 √
Blackhawk Paper & Cordage Co √	12.69 √	.26	12.95 √	6/15/31	15345 √
The Bunting Brass & Bronze Co √	3,097.78	35.29	2,835.27	.....	.....
Forward					

*Indicates cancelled in original.
†Indicates bold-face—red in original.
Figures in bold-face indicates red in original.

PLAINTIFF'S EXHIBIT 18A.
Journal of Disbursements

...e Co.
...is

Month of June 1931 — Sheet No. 51

...e Order of	Amount of Check	Discount	Accounts Payable	Date	Check No.	Third Nat'l Bank	Swed.-Amer. Nat'l Bank	Manufacturers Nat'l Bank	Peoples Bank & Trust Co.	Rockford Nat'l Bank	Security Nat'l Bank	Miss. Valley Trust Co.	General Ledger Account Name	General Ledger Number	General Ledger Amount	√
.....	57,735.11	110.75	15,084.74	.....	.....	.....	.....	43,190.18	.....	.....	14,544.93	.....	.....	.....	42,761.12	..
..... √	88.07 √	.....	.....	6/12/31	15295 √	.....	.....	.....	.....	.....	88.07	.....	.....	*24	88.07	..
...int Co ..... √	35,000.00 √	.....	.....	6/12/31	15310 √	.....	.....	.....	.....	.....	35,000.00	.....	.....	*31D	35,000.00	..
.....	**92,823.18**	**110.75**	**15,084.74**	.....	.....	.....	.....	**43,190.18** √	.....	.....	**49,633.00** √	.....	.....	.....	**77,849.19**	..
.....	83,922.10	113.86	9,571.87	.....	.....	10,000.00	.....	57,612.11	.....	.....	16,309.99	.....	.....	.....	74,464.09	..
.....	**176,745.28**	**224.61**	**24,656.61**	.....	.....	**10,000.00**	.....	**100,802.29**	.....	.....	**65,942.99**	.....	.....	.....	**152,313.28**	..
.....	25.00	.....	.....	6/13/31	15333	.....	.....	.....	.....	.....	.....	.....	.....	50	25.00	..
.....	80.00	.....	.....	6/13/31	15334	.....	.....	.....	.....	.....	.....	.....	.....	50	80.00	..
.....	75.00	.....	.....	6/13/31	15335	.....	.....	.....	.....	.....	.....	.....	.....	50	75.00	..
.....	65.00	.....	.....	6/13/31	15362	.....	.....	.....	.....	.....	.....	.....	.....	50	65.00	..
.....	**245.00**	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	**245.00**	..
.....	176,745.28	224.61	24,656.61	.....	.....	10,000.00	.....	100,802.29	.....	.....	65,942.99	.....	.....	.....	152,313.28	..
.....	**176,990.28**	**224.61**	**24,656.61**	.....	.....	**10,000.00**	.....	**101,047.29**	.....	.....	**65,942.99**	.....	.....	.....	**152,558.28**	..
...eck	25.00	.....	.....	6/13/31	15333	.....	.....	25.00	.....	.....	.....	.....	.....	50	25.00	..
.....	80.00	.....	.....	6/13/31	15334	.....	.....	80.00	.....	.....	.....	.....	.....	50	80.00	..
.....	75.00	.....	.....	6/13/31	15335	.....	.....	75.00	.....	.....	.....	.....	.....	50	75.00	..
.....	65.00	.....	.....	6/13/31	15362	.....	.....	65.00	.....	.....	.....	.....	.....	50	65.00	..
.....	**245.00**	.....	.....	.....	.....	.....	.....	**245.00**	.....	.....	.....	.....	.....	.....	**245.00**	..
.....	176,990.28	224.61	24,656.61	.....	.....	10,000.00	.....	101,047.29	.....	.....	65,942.99	.....	.....	.....	152,558.28	..
.....	**176,745.28**	**224.61**	**24,656.61**	.....	.....	**10,000.00**	.....	**100,802.29**	.....	.....	**65,942.99**	.....	.....	.....	**152,313.28**	..
...k ..... √	38.25 √	.....	38.25 √	6/16/31	15331 √	38.25 √	.....	.....	.....	.....	.....	.....	.....	†105B *50 √	25.00	..
..... √	25.00 √	.....	.....	6/13/31	15333 √	25.00 √	.....	.....	.....	.....	.....	.....	.....	†105B *50 √	80.00	..
..... √	80.00 √	.....	.....	6/13/31	15334 √	80.00 √	.....	.....	.....	.....	.....	.....	.....	†105B *50 √	75.00	..
..... √	75.00 √	.....	.....	6/13/31	15335 √	75.00 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
..... √	90.50 √	.....	90.50 √	6/15/31	15398 √	90.50 √	.....	.....	.....	.....	.....	.....	√ Ralph Ebert	†105A *24 √	15.00	..
..... √	15.00 √	.....	.....	6/15/31	15399 √	15.00 √	.....	.....	.....	.....	.....	.....	√ Packard	†103 *21 √	102.80	..
..... √	102.80 √	.....	.....	6/15/31	15400 √	102.80 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
..... √	16.96 √	.....	16.90 √	6/16/31	15408 √	16.96 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
...ny ..... √	6.12 √	.....	6.12 √	6/16/31	15409 √	6.12 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
..... √	.65 √	.....	.65 √	6/16/31	15410 √	.65 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
..... √	20.74 √	.....	20.74 √	6/16/31	15411 √	20.74 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
..... √	47.41 √	.....	47.41 √	6/16/31	15412 √	47.41 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
...Company ..... √	1,128.13 √	23.02	1,151.15 √	6/16/31	15413 √	1,128.13 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
..... √	838.19 √	16.97	855.16	6/16/31	15415 √	838.19	E.RR	.....	.....	838.19 √	.....	.....	.....	.....	.....	..
...Belw. Sons Mach)						838.19	S/B Rfd Natl	.....	.....	113.18 √	.....	.....	.....	.....	.....	..
..... √	113.18 √	2.31	115.49 √	6/15/31 √	15336 √	.....	.....	.....	.....	33.17 √	.....	.....	.....	.....	.....	..
..... √	33.17 √	.68	33.85 √	6/15/31	15337 √	.....	.....	.....	.....	7.48 √	.....	.....	.....	.....	.....	..
...any ..... √	7.48 √	.15	7.63 √	6/15/31	15338 √	.....	.....	.....	.....	119.34 √	.....	.....	.....	.....	.....	..
...Co ..... √	119.34 √	2.43	121.77 √	6/15/31	15339 √	.....	.....	.....	.....	20.31 √	.....	.....	.....	.....	.....	..
...g Co ..... √	20.31 √	.21	20.52 √	6/15/31	15340 √	.....	.....	.....	.....	5.94 √	.....	.....	.....	.....	.....	..
..... √	5.94 √	.06	6.00 √	6/15/31	15341 √	.....	.....	.....	.....	253.51 √	.....	.....	.....	.....	.....	..
...ny ..... √	253.81 √	5.17	258.68 √	6/15/31	15342 √	.....	.....	.....	.....	24.64 √	.....	.....	.....	.....	.....	..
...oration ..... √	24.64 √	.77	25.41 √	6/15/31	15343 √	.....	.....	.....	.....	22.77 √	.....	.....	.....	.....	.....	..
...dage Co ..... √	22.77 √	.23	23.00 √	6/15/31	15344 √	.....	.....	.....	.....	12.69 √	.....	.....	.....	.....	.....	..
...onze Co ..... √	12.69 √	.26	12.95 √	6/15/31	15345 √	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	..
.....	3,097.78	35.29	2,835.27	.....	.....	1,646.56	.....	.....	.....	1,451.22	.....	.....	.....	.....	297.80	..

...ed in original.
...ce—red in original.
...e indicates red in original.

235
50 Mechanics Machine Co.
Rockford, Illinois

PLAINTIFF'S EXHIBIT 19.
Journal of Disbursements

Month of June 1931

Sheet No. 50

Pay to the Order of	Amount of Check	Discount	Accounts Payable	Date	Check No.	Third Nat'l Bank	Swed.-Amer. Nat'l Bank	Manufacturers Nat'l Bank	Peoples Bank & Trust Co.	Rockford Nat'l Bank	Security Nat'l Bank	Miss. Valley Trust Co.	General Ledger Account Name	General Ledger Number	General Ledger Amount	√
Forward **Total**	25,191.61		291.61					25,291.61							25,000.00	
Previous Total	26,743.52	10.59	1,600.01					14,243.52			12,500.00				25,154.10	
Total to Date	**52,035.13**	**10.59**	**1,891.62**					**39,535.13**			**12,500.00**				**50,154.10**	
Private Pay Roll	3,809.99			6/ 9/31							3,809.99 √			151B *32 √	3,809.99	
Mechanics Universal Joint Company	10,000.00			6/ 9/31	15178	10,000.00 √								101F *32 √	10,000.00	
Mechanics Universal Joint Company	10,500.00			6/ 9/31	15179			10,500.00 √						101F *32 √	10,500.00	
Total	**24,309.99**					**10,000.00** √		**10,500.00** √			**3,809.99** √				**24,309.99**	
Previous Total	52,035.13	10.59	1,891.62					39,535.13			12,500.00				50,154.10	
Total to Date	**76,345.12**	**10.59**	**1,891.62**					**50,035.13**			**16,309.99**				**74,464.09**	
The Bunting Brass & Bronze Co √	9.61	.20	9.81 √	6/10/31	15181			9.81								
Borg Warner Corporation √	1,411.51		1,411.51 √	6/10/31	15182			1,411.51								
The Carborundum Co √	130.66	2.67	133.33 √	6/10/31	15183			130.66								
Globe Steel Tubes Company √	2,436.87	50.76	2,487.63 √	6/10/31	15184			2,436.87 √								
Hyatt Roller Bearing Co √	825.16	16.84	842.00 √	6/10/31	15185			825.16								
Miller Rubber Products Co √	360.56	7.36 √	367.92 √	6/10/31	15186			360.56								
The New Departure Manufacturing Co √	774.53	15.81	790.34 √	6/10/31	15187			774.53								
The Reliance Manufacturing Co √	56.52	1.15 √	57.67 √	6/10/31	15188			56.52								
Steel & Tubes, Inc √	1,451.37	7.29	1,458.60 √	6/10/31	15189			1,451.37								
Vacuum Oil Company √	21.38	.22	21.60 √	6/10/31	15190			21.38 √								
Keener Manufacturing Co √	57.42	.58	58.00 √	6/10/31	15191			57.42								
Rockford Wholesale Grocery Co √	11.86	.24	12.10 √	6/10/31	15192			11.86 √								
Federal Steel Corporation √	29.53	.15	29.68 √	6/10/31	15193			29.53								
Total	**7,576.98**	**103.27**	**7,680.25**					**7,576.98** √								
Previous Total	76,345.12	10.59	1,891.62			10,000.00		50,035.13			16,309.99				74,464.09	
Total to Date	**83,922.10**	**113.86**	**9,571.87**			**10,000.00**		**57,612.11**			**16,309.99**				**74,464.09**	
Rockford Drop Forge Company √	14,544.93 √	109.89	14,654.82 √	6/12/31	15266						14,544.93 √					
Jubilee Committee √	10.00 √		10.00 √	6/12/31	15273			10.00								
Rockford Milwaukee Dispatch √	22.92 √		22.92 √	6/12/31	15274			22.92								
Universal Carloading & Distributing Co √	10.17 √		10.17 √	6/12/31	15275			10.17								
National Freight Company, Inc √	192.41 √		192.41 √	6/12/31	15276			192.41								
Keeshin Motor Express Company √	3.18 √		3.18 √	6/12/31	15277			3.18								
Railway Express Agency, Inc √	31.33 √		31.33 √	6/12/31	15278			31.33								
Chicago & North Western Ry. Co √	6.88 √		6.88 √	6/18/31	15279			6.88								
Illinois Central R. R. Co √	65.35 √		65.35 √	6/12/31	15280			65.35								
C. M. St. P. & Pac. R. R. Co √	1.33 √		1.33 √	6/12/31	15281			1.33								
Belvidere Screw & Machine Co √	13.03 √	.13	13.16 √	6/12/31	15282			13.03								
Bliss & Laughlin, Inc √	17.57 √	.09	17.66 √	6/12/31	15286			17.57								
Crane Company √	1.47 √	.02	1.49 √	6/12/31	15287			1.47								
Central Motor Parts Company, Inc √	15.76 √	.32	16.08 √	6/12/31	15288			15.76								
Holmquist Lumber & Fuel Co √	1.77 √	.03	1.80 √	6/12/31	15289			1.77 √								
Jones & Laughlin Steel Corp √	1.08 √		1.08 √	6/12/31	15290			1.08								
Stewart Warner Corp √	2.10 √	.04	2.14 √	6/12/31	15291			2.10								
Pratt & Whitney Company √	11.47 √	.23	11.70 √	6/12/31	15292			11.47								
Third National Bank √	21.24 √		21.24 √	6/12/31	15293			21.24								
Mechanics Universal Joint Company √	42,761.12 √			6/12/31	15294			42,761.12 √						101A *31A √	42,761.12	
Forward	57,735.11	110.75	15,084.74					43,190.18			14,544.93				42,761.12	

*Indicates cancelled in original.
†Indicates bold-face—red in original.
Figures in bold-face indicates red in original.

236 PLAINTIFF'S EXHIBIT 20.

Make check to Mech
Univ Jt Co
for 42,761.12
Draw on Mfrs. Nat'l
Bank

(Mechanics Universal
Joint Company
Paid
Jun 13 1931

Trans. of Cash

By.....
Rockford, Ill.*)

237 PLAINTIFF'S EXHIBIT 22.

Checks in Detail
from
Manufacturers National Bank
and Trust Co.
Mech. Universal Joint
4-17-1931

2,117.29*	
24.28	
9.26	
5.35	
13.75	
543.61	
10.22	
1,293.60	
278.69	(Perforated)
9.99	Paid
1.57	4 17 31
2.74	
11.14	
1.00	
4.02	
2.94	
37.57	
91.87	
6.17	
90.64	
206.53	
4,762.23*	

238	4-20-1931	
	18.46	
	237.83	
	218.03	
	38.72	
	11.76	
	7.98	
	556.02	(Perforated)
	86.24	Paid
	100.00	4 20 31
	97.00	
	50.00	
	15.00	
	9.02	
	428.73	
	1,874.99	
239	4-21-1931	
	21.73*	
	21.19	
	159.35	
	113.82	
	37.73	
	9.11	
	24.05	
	16.23	
	435.60	(Perforated)
	84.74	Paid
	648.00	4 21 31
	.65	
	44.55	
	79.79	
	10.90	
	1,707.44*	
	1,707.44*	
	18.19	
	13.28	
	1,738.91*	

240	4-22-1931	
	18.00*	
	21.38	
	6.30	
	52.61	(Perforated)
	2,076.56	Paid
	42.58	4 22 31
	148.30	
	6.24	
	.50	
	2,372.27''	
241	4-23-1931	
	58.93	
	4.12	
	17.76	
	21.00	
	156.21	(Perforated)
	4.45	Paid
	22.65	4 23 31
	.38	
	4.58	
	43.12	
	334.20	
242	4-24-1931	
	75.95*	
	39.67	
	7.96	(Perforated)
	173.95	Paid
	30.47	4 24 31
	14.18	
	7.36	
	349.54*	

243		5-2-1931	
		298.48	
		98.03	
		39.20	
		1,903.35	
		518.36	
		34.30	
		5.07	(Perforated)
		2.40	Paid
		25.93	5 2 31
		204.70	
		50.00	
		23.71	
		6.55	
		19.50	
		107.47	
		229.00	
		388.08	
		132.30	
		4,086.43	
244	May	4-4-1931	
		26.35*	
		1.80	
		33.01	
		17.11	
		53.90	
		.41	
		3,791.47	
		19.00	
		1.47	
		8.56	(Perforated)
		25.00	Paid
		.63	5 4 31
		1.49	
		2.44	
		86.64	
		1.95	
		8.57	
		125.00	
		53.90	
		5.54	
		8.13	
		8.38	
		4,280.75*	

245	5-5-1931	
	11.17	
	29.92	
	12.50	
	86.73	
	887.98	
	1,088.77	
	34.40	
	2,995.12	(Perforated)
	81.46	Paid
	7.62	5 5 31
	3.49	
	1.61	
	105.11	
	80.38	
	9.74	
	217.10	
	10.00	
	55.88	
	8.91	
	5,727.89*	
246	5-18-1931	
	5.67*	
	1,095.15	
	6.76	
	2.07	
	5.05	
	8.58	
	33.75	
	11,378.59	
	364.90	(Perforated)
	116.90	Paid
	2.64	5 18 31
	166.83	
	38.71	
	229.83	
	5.78	
	239.13	
	2.34	
	7.12	
	.78	
	17.25	
	2.64	
	6.75	
	16.23	
	14,121.25*	

247	5-19-1931	
	243.04*	
	4.90	
	188.23	
	1,281.43	
	7.64	
	11.25	
	21.35	
	18.85	
	56.42	(Perforated)
	10.81	Paid
	7.60	5 19 31
	1.21	
	.75	
	.75	
	23.68	
	.50	
	1.46	
	26.19	
	46.42	
	5.59	
	15.29	
	1,973.76*	
248	5-20-1931	
	71.38*	
	48.63	
	217.30	
	16.42	
	69.35	
	10.50	
	3.69	(Perforated)
	33.96	Paid
	4,854.83	5 20 31
	10.85	
	21.02	
	24.46	
	46.61	
	13.23	
	1.65	
	5,443.88*	

249	5-22-1931	
	29.15*	
	135.25	
	9.98	
	154.35	
	445.25	
	1,166.21	(Perforated)
	10.80	Paid
	24.00	5 22 31
	5.40	
	1.36	
	1.78	
	27.73	
	2,011.26*	
250	6-2-1931	
	7.58*	
	25.00	
	.75	
	15.48	
	58.80	
	44.59	
	206.28	
	.75	
	10.89	
	15.09	
	.54	
	2.08	(Perforated)
	284.20	Paid
	995.04	6 2 31
	15.44	
	86.24	
	118.99	
	2.18	
	2.33	
	262.59	
	170.63	
	2,325.47*	
	2,325.47*	
	40.00	
	103.31	
	67.94	
	2,536.72*	

251	6-3-1931	
	8.19*	
	55.00	
	10.58	
	12.56	
	2.16	
	40.03	
	13.71	
	305.32	
	2.57	(Perforated)
	67.37	Paid
	7.77	6 3 31
	23.27	
	450.31	
	13.10	
	35.14	
	29.64	
	34.45	
	2.16	
	1.24	
	1.59	
	44.10	
	1,160.26*	
252	6-5-1931	
	122.50*	
	218.78	
	264.35	
	34.40	
	1.26	(Perforated)
	275.00	Paid
	4.30	6 5 31
	254.80	
	6.30	
	65.09	
	.65	
	1,247.43*	
253	6-6-1931	
	279.10*	
	12,500.00	
	19.34	(Perforated)
	1,329.49	Paid
	15.29	6-6-31
	77.26	
	14,220.48*	

254

6-10-1931	
25,000.00*	
10,500.00	
28.41	
8.23	
1.86	(Perforated)
7.78	Paid
7.21	6 10 31
23.68	
4.43	
.75	
1.15	
5.83	
35,589.33*	

255 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

STIPULATION.

It is hereby stipulated and agreed by and between plaintiff herein by C. H. Linscott and Roy Hall, his solicitors, and the defendants herein, by S. R. Kenworthy and Shelby L. Large, their solicitors, that original of certain Exhibits introduced in evidence by the plaintiff at the trial of the above entitled cause, and numbered Plaintiff's Exhibit 22, Plaintiff's Exhibit 23, Plaintiff's Exhibit 24, and Plaintiff's Exhibit 25 may be forwarded by the Clerk of the District Court to the Clerk of the Circuit Court of Appeals of the Seventh Circuit with the record in said cause for examination by said Circuit Court of Appeals in connection with said appeal; that this stipulation may be inserted in the transcript of record in lieu of said Plaintiff's Exhibits 22-23-24-25.

C. H. LINSCOTT,
Solicitor for Plaintiff.

S. R. KENWORTHY,
SHELBY L. LARGE,
Solicitors for Defendants.

256 PLAINTIFF'S EXHIBIT 26.

Regular Directors Meeting December 12, 1930

Directors Present:

H. A. Taylor	Hugo L. Olson
Oscar Milburn	K. E. Knutsson
C. E. Lindberg	E. S. Ekstrom
A. R. Floberg	F. F. Nelson

Fred Peterson

Minutes of November meeting were read and approved.

List of new loans from #123395 to #123929

Discount Loans	$132,105.00
Discounts	29,827.66
Total	$161,932.66

was read and approved upon motion by Director Knutsson seconded by director Milburn. Itemized expense accounts for month of November totalling $9,099.98 was read and approved on motion by Director Ekstrom seconded by Director Olson. Director Lindberg inquired about Illinois Veneer Company Discount this line reported reduced from $25,000 to $8000 and items taken now good current trade paper.

Director Knutsson inquired about R. R. Shirley loan $200.00. It was reported that Shirley carried respectable account and borrows only small amounts for short periods. Resolution granting authority to officers of this bank to rediscount and borrow on collateral at Federal Reserve Bank of Chicago was passed upon motion by director Olson, seconded by Director Ekstrom. Copy of resolution on file with minutes.

Resolution granting authority to officers of this bank to rediscount and borrow on collateral at The Continental Illinois Bank and Trust Company, Chicago, was passed upon motion by Director Nelson, seconded by Director Lindberg, copy of resolution on file with minutes.

The following resolution was passed upon motion by director Olson seconded by Director Milburn.

Resolution:

Resolved that The Manufacturers National Bank and Trust Company of Rockford, Illinois, as Trustee for the Estate of A. C. Deming, be and is hereby authorized to sell for this Estate at price offered, ten shares of The Peoples Bank &

Trust Company of Rockford, Illinois, stock proceeds to be credited to this estate account.

Report of earnings and expenses for month of November, 1930 was handed each director and copy filed with minutes.

Complying with recommendation of Chief Examiner Leyburn, no quarterly dividend was voted at this meeting.

257 It was agreed that directors should meet Monday evening December 15th for the purpose of reviewing all of the bank loans.

There being no further business the meeting was adjourned upon motion by director Ekstrom, seconded by director Nelson.

H. A. CONKLIN
Secretary

A. R. FLOBERG
Pt.

258 Resolution of Bank Board of Directors

I, H. A. Conklin, Do Hereby Certify, that I am the duly (elected) (~~*appointed*~~) and qualified (Cashier) (~~*Secretary*~~) and the keeper of the records and corporate seal of The Manufacturers National Bank and Trust Company of Rockford, Illinois, a banking corporation organized and doing business under the (Laws of the State of Illinois) (National Banking Act of the United States of America) and having its principal place of business at Rockford, in the State of Illinois, and that the following is a true and correct copy of a certain resolution duly adopted at a regular meeting of the Board of Directors of said Bank, convened and held in accordance with the laws and the by-laws of said Bank on the 12th day of December, 1930, and that such resolution is now in full force and effect:

"Be It Resolved, that the officers of this Bank be and each of them is hereby authorized and empowered to borrow, on behalf of this Bank, from Continental Illinois Bank and Trust Company, Chicago, Illinois, from time to time, such sums of money, on such terms and conditions, as to any of them shall seem best, and to modify, extend or renew any and all or any part of loans so made until same are fully paid with interest; and to give, sign, execute and deliver the obligation or obligations of this Bank in evidence of such loan or loans, in such form and with such conditions, terms, stipulations, provisions and waivers, as such officer or person may deem proper and to pledge for the payment of any such loan or loans, or exten-

sion or renewal thereof, or any indebtedness, obligation or liability of this Bank, the securities, assets or property of this Bank, and to make withdrawals substitutions and/or exchanges of, to receive and receipt for, and to remove upon trust receipt any and all collateral so pledged as aforesaid at the risk of this Bank, which hereby agrees to indemnify said Continental Illinois Bank and Trust Company against any loss arising out of the acts of said officers or persons, or any of them, with respect to said collateral; and they and each of them are hereby further authorized and empowered to rediscount with said Continental Illinois Bank and Trust Company the bills receivable of this Bank and to enter into sale and repurchase agreements respecting any securities, assets and property of this Bank, upon such terms and conditions as to any of them shall seem best, and, for any of the purposes aforesaid, to endorse, assign, transfer and/or deliver, in the name of this Bank, its accounts, bills receivable, securities and/or other property; and said Continental Illinois Bank and Trust Company may at any time appropriate and apply any money or property of this Bank to the payment of any indebtedness, obligations or liabilities from this Bank to it, whether or not due or accrued; and each and every act of the officers of this Bank in heretofore transacting business of the several kinds aforesaid with said Continental Illinois Bank and Trust Company are hereby ratified, confirmed and approved.

And Be It Further Resolved, that the Cashier or any other officer of this Bank be and hereby is authorized to certify to said Continental Illinois Bank and Trust Company a copy of these resolutions and the names and signatures of the officers or employees of this Bank thereby authorized to act in the premises, and said Trust Company is hereby authorized to rely upon such certificate until formally advised by a like certificate of any changes therein; and is authorized to rely on any such additional certificates.

259 In Witness Whereof, I have affixed my name as (Cashier) (Secretary) and have caused the corporate seal of said Bank to be hereunto affixed this 19th day of December, 1930.

H. A. CONKLIN
Cashier

I, A. R. Floberg, a Director of said Bank, do hereby certify that the foregoing is a correct copy of a resolution passed as therein set forth.

A. R. FLOBERG

260 PLAINTIFF'S EXHIBIT 26a.

Authority to Rediscount and to Borrow on Collateral

Whereas, this Bank is a stockholder in the Federal Reserve Bank of Chicago; and

Whereas, it is highly desirable that this Bank should from time to time be able to rediscount its bills receivable with the Federal Reserve Bank of Chicago and be able from time to time to borrow money from the Federal Reserve Bank of Chicago on its own obligation secured by a pledge of its own bills receivable;

Now, Therefore, Be It Resolved:

First: That the President, or any Vice-President, or the Cashier, or any Assistant Cashier or any other executive officer of this Bank, or any one of them, is hereby authorized to rediscount from time to time with the Federal Reserve Bank of Chicago notes, drafts, acceptances, bills of exchange and other bills receivable of this Bank in such amounts and upon such terms as may to them or any one of them seem advisable; and such officer or officers are hereby authorized to secure the liability of this Bank arising out of the endorsement of such notes, drafts, acceptances, bills of exchange and other bills receivable of this Bank so rediscounted by pledging to and depositing with said Federal Reserve Bank of Chicago as collateral thereto, any of the bills receivable of this Bank duly endorsed or any bonds, notes, securities or other assets owned by this Bank, in such amounts and upon such terms as may to them or to any one of them seem advisable.

Second: That the President, or any Vice-President, or the Cashier, or any Assistant Cashier or any other executive officer, of this Bank, or any one of them, is hereby authorized to borrow money from time to time from the Federal Reserve Bank of Chicago, in such amounts and upon such terms as may to them or any one of them seem advisable, and to execute and deliver the note of this Bank therefor, and such officer or officers are hereby authorized to secure such note or notes of this Bank by depositing as collateral thereto any of the bills receivable of this Bank duly endorsed, or by depositing or pledging as collateral thereto, any bonds or notes of the United States owned by this Bank, in such amounts and upon such terms as may to them or any one of them seem advisable.

Third. That each and every of said officers in connection with offering said bills receivable or any of them for discount

or in connection with depositing said bills receivable as collateral security, is hereby authorized to endorse in behalf of this Bank any such bills receivable, now or hereafter owned by this Bank, for the purpose of rediscounting the said bills receivable, with the Federal Reserve Bank of Chicago, or for the purpose of depositing such bills receivable with said Bank as collateral security, and any such endorsement shall be deemed a waiver of demand, notice, and protest by this Bank as to its own endorsement exclusively.

Fourth: That the foregoing powers conferred upon each and every of such officers shall continue until express notice of their revocation has been duly given in writing to the said Federal Reserve Bank of Chicago.

Fifth: That the Cashier of this Bank (the Secretary of the Board of Directors) be and he is hereby requested to
261 deliver to the Federal Reserve Bank of Chicago a certified copy of this resolution.

I, the undersigned, do hereby certify that the foregoing is a true and correct copy of a resolution of the Board of Directors of the The Manufacturers National Bank & Trust Co. Bank of Rockford, Illinois duly passed at a regular meeting of the said Board, held at Rockford, Ill. on the 12th day of Dec. 1930, a quorum being present, as fully and completely as the said resolution remains of record in the minutes of said meeting, and that said resolution has not been rescinded or modified.

In Witness Whereof, I have hereunto subscribed my name and affixed the corporate seal of said The Manufacturers National Bank & Trust Co. Rockford, Illinois Bank at Rockford, Ill. this 13th day of Dec. 1930.

H. A. CONKLIN
Cashier.

(Seal)

Secretary Board of Directors.

262 PLAINTIFF'S EXHIBIT 32.

This Agreement made and entered into this eleventh day of June A. D. 1931, by and between the Swedish-American National Bank of Rockford, Illinois, party of the first part, and the Security National Bank of Rockford, Illinois, party of the second part, both being corporations duly organized and incorporated under the National Banking Act, Witnesseth, That

Whereas the first party has submitted to the second party

a proposal that first party purchase the assets and assume the liabilities of the second party, as shown by the books of the second party, at the close of business on the 13th day of June, A. D. 1931, upon certain terms to be set out fully in a contract to be entered into by and between the parties thereto, subject to an appraisal of the assets by the party of the first part, and subject, also, to the approval of the Comptroller of the Currency.

The Second party hereby agrees to transfer, assign and convey to the first party all of its assets on hand at the close of business on the 13th day of June, A. D. 1931, the same to be fully set out in the contract above mentioned.

This Obligation shall be binding upon the parties hereto, the successors and assigns of each.

In Witness Whereof the Swedish-American National Bank of Rockford, Illinois, party of the first part has caused these presents to be signed by its President and attested by its Cashier, in duplicate, and the Security National Bank of Rockford, Illinois, party of the second part, has caused these presents to be signed by its President ~~*and attested by its Secretary*~~ in duplicate, all at Rockford, Illinois, on the day and year first above written.

SWEDISH AMERICAN NATIONAL BANK
By J. A. AUFEN
Its President

Attest:—
G. A. PETERSON
Cashier
Its Secretary.

SECURITY NATIONAL BANK
By TRUMAN JOHNSON
Its President.

Attest:—

.....
Its Secretary.

263 PLAINTIFF'S EXHIBIT 33.

Name No.

Forgings & Stampings Inc. 30994

I Hereby Agree to the Savings Department Rules and Regulations of The Manufacturers National Bank & Trust Co.
Rockford, Ill.

Signature Forgings & Stampings Inc.
c/o Frank P. Franzen
Residence 23rd Ave. & 7th St. Date
Occupation Place
Mother's Name
Father's Name
Wife's
Husband's Dec 17 1930
Identified by

Presented and approved October 30, 1934.

CHARLES E. WOODWARD,
U. S. District Judge.

197 DEFENDANT'S EXHIBIT 1.

Close of Business
June 1, 1931

Continental		$ 6,770.39	
C/D "		250,000.00	
Union Trust		295.70	
National City		2,116.02	
Federal		290,702.90	
Fed. Transit		37,724.63	
Chase		12,611.74	
Commerce		858.65	
Cash		208,898.04	$809,978.07
Bills Rec.			2,429,478.54
Deposits:	City	1,070,005.57	
	Ind.	1,167,551.44	
	Sav.	1,853,680.95	
	Other	319,264.18	4,410,549.00
Bonds		331,181.30	
Bankers Accept.		499,750.32	
Com'l. paper		70,000.00	
Avail Fed.		10,191.50	
Pledged with City Treas:			
Bankers Accept.		499,750.32	
C/D		250,000.00	
General Motors		50,000.00	
Univ. Credit		20,000.00	
B. R.		244,900.00	
		1,064,650.32	

198 DEFENDANT'S EXHIBIT 2.

Close of Business
June 6, 1931

Continental		$99,568.20	
C/D "		250,000.00	
Union Trust		294.05	
National City		2,116.02	
Federal		247,964.60	
Fed. Transit		32,294.14	
Chase		74,401.80	
Commerce		868.57	
Cash		121,373.91	$828,881.29
Bills Rec.			2,409,220.29
Deposits:	City	1,178,546.80	
	Ind.	1,107,627.99	
	Sav.	1,840,234.73	
	Other	323,994.17	4,450,403.00
Bonds		377,081.30	
Bankers Accept.		499,750.32	
Com'l paper		70,000.00	
Avail Fed.		9,424.27	
Pledged with City Treas:			
Bankers Accept.		499,750.32	
C/D		250,000.00	
General Motors		50,000.00	
Univ. Credit		20,000.00	
B. R.		65,400.00	
		1,124,050.32	

199 DEFENDANT'S EXHIBIT 3.

Close of Business
June 12, 1931

Continental		$ 2,518.56	
C/D "		250,000.00	
Union Trust		294.05	
National City		2,116.02	
Federal		244,775.24	
Fed. Transit		47,783.23	
Chase		6,933.22	
Commerce		868.57	
Cash		411,452.74	966,741.63
Bills Rec.			2,376,355.91
Deposits:	Demand Cert.	235,103.60	
	Ind.	2,116,109.96	
	Savings.	1,812,120.64	
	Postal	41,983.47	
	Thrift	27,647.50	
	Thrift Closed	63.14	
	Vacation Club	6.25	$4,254,543.00
Bonds		358,227.54	
Bankers Accept.		499,750.32	
Com'l. paper		70,000.00	
Avail Fed.		10,022.99	
Pledged with City Treas:			
Bankers Accept.		499,750.32	
C/D		250,000.00	
General Motors		50,000.00	
Univ. Credit		20,000.00	
B. R.		296,100.00	
City Warrants		35,900.00	
" Bonds		2,000.00	

200 DEFENDANT'S EXHIBIT 4.

Close of Business
June 13, 1931

Continental		923.52	
C/D "		250,000.00	
Union Trust		294.05	
National City		2,116.02	
Federal		220,181.81	
Fed. Transit		47,727.59	
Chase		7,925.51	
Commerce		868.57	
Cash		295,918.10	825,955.17
Bills Rec.			2,363,601.53
Deposits:			
	Demand Cert.	235,103.60	
	Ind.	2,034,063.45	
	Sav.	1,794,230.01	
	Postal	41,983.47	
	Thrift	27,609.75	
	Thrift Closed	63.14	
	Vacation Club	6.25	$4,147,368.00
Bonds		348,402.54	
Bankers Occept.		499,750.32	
Com'l. paper		70,000.00	
Avail Fed.		10,022.99	
Pledged with City Treas:			
Bankers Accept.		499,750.32	
C/D		250,000.00	
General Motors		50,000.00	
Univ. Credit		20,000.00	
B. R.		296,100.00	
City Warrants		35,900.00	
" Bonds		2,000.00	

201 DEFENDANT'S EXHIBIT 5.

The Manufacturers National Bank and Trust Company
of Rockford, Illinois
Insolvent

Close of Business—June 13, 1931.

Resources	
Loans & Discounts	$2,363,601.53
Bankers Acceptances	499,750.32
C/D acct. Cont'l. Ill. Bank & Trust Co.	250,000.00
Overdrafts	1,029.83
U. S. Bonds to secure circulation	200,000.00
Premium on U. S. bonds	5,883.13
U. S. bonds pledged to secure Postal Savings	42,000.00
U. S. Bonds to Secure trust Dep. State	100,000.00
U. S. Bonds to secure Trust funds	56,160.00
U. S. Bonds to secure State deposits	161,800.00
U. S. Bonds unpledged	2,408.36
Other bonds pledged Continental Bank	150.861.87
Other bonds pledged Sec. Trust Dept.	25,760.00
Other bonds pledged Receivership Dep.	7,776.25
Other bonds pledged City Dep.	34,700.00
Defaulted bonds	3,825.00
Bonds unpledged	167,015.67
Claims	14,621.61
Federal Reserve Bank stock	21,000.00
Banking house	538,000.00
Furniture & Fixtures	54,247.21
Other Real Estate	21,660.01
Federal Reserve Bank	220,181.81
Federal Reserve Bank, Transit	47,727.59
Continental Illinois Bank & Trust Co.	923.52
Union Trust Co. Cleveland	294.05
National City Bank New York	2,116.02
Chase National Bank New York	7,925.51
Merc. Com. Bank & Trust Co., St. Louis	868.57
Second National Bank, Beloit, Wis.	308.27
Cash Items	2,122.719
Clearings	39,546.25
Cash	253,240.06
Coupons for collection	4,515.61
Transit	2,430.78
5% Fund	10,000.00
Cash Short	1,077.19
Total:—	$5,315,378.81

Liabilities	
Capital	500,000.00
Surplus	200,000.00
Undivided profits	49,810.54
Reserves	8,721.30
Due to banks	1,092.22
Cashier's checks	12,111.58
Certified checks	1,523.61
Balance checks	611.65
Dividend checks	393.02
Individual deposits	2,034,063.45
Demand Certificates	235,103.60
Savings Deposits	1,794,230.01
Postal Savings Deposit	41,983.47
Thrift Savings	27,609.75
Thrift Savings Club closed	63.14
Vacation club	6.25
Bills Payable	100,000.00
Rediscounts	100,054.92
Circulation	200,000.00
Loss on bonds not allocated	8,000.00
Total:—	$5,315,378.81

I hereby certify the above to be a correct copy of the Statement of Condition of The Manufacturers National Bank and Trust Company of Rockford, Illinois as of June 13, 1931, as taken from the daily statement register.

M. R. BATY,
Examiner.

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DEFENDANT'S EXHIBIT 6.

The Manufacturers National Bank and Trust Co., Rockford, Illinois.

Sheet No. ..... Name Mechanics Universal Joint Co.

Address

Old Balance	Date		Checks in Detail								
							1931				
	Balance Brought Forward.....					Jan.	8	11,764.94			
	1931								1931		
	Jan.	8	24.70–	15.90–	28.00–				Jan.	8	11,697.24*
11,697.24	Jan.	9	75.00	14.54–		Jan.	9		Jan.	9	11,607.70*
11,607.70	Jan.	10	951.02LS						Jan.	10	10,656.68*
10,656.68	Jan.	12	124.70LS						Jan.	12	10,531.98*
10,531.98	Jan.	13	441.48LS						Jan.	13	10,090.50*
10,090.50	Jan.	16	22.48LS						Jan.	16	10,068.02*
10,068.02	Jan.	17	92.62LS			Jan.	17	19,011.10	Jan.	17	28,986.50*
28,986.50	Jan.	19	59.28–						Jan.	19	28,927.22*
28,927.22	Jan.	19	56.85–			Jan.	19	148.98	Jan.	19	29,019.35*
29,019.35	Jan.	19	148.98–						Jan.	19	28,870.37*
28,870.37	Jan.	20	326.56LS						Jan.	20	28,543.82*
28,543.82		21	12.61–	24.68–	40.00–						
	Jan.	21	.75–						Jan.	21	28,465.78*
28,465.78	Jan.	22	30.19–	.75–					Jan.	22	28,434.84*
28,434.84	Jan.	23	499.81LS						Jan.	23	27,935.03*
27,935.03	Jan.	24	9.31–						Jan.	24	27,925.72*
27,925.72	Jan.	26	10.00–	47.34–	26.88–				Jan.	26	27,841.50*
27,841.50	Jan.	28	25.00–						Jan.	28	27,816.50*
27,816.50	Jan.	28	4.54–	2.39–	12.57–						
	Jan.	28	5.64–	25.00–					Jan.	28	27,766.36*
27,766.36	Jan.	29	10.57–	2.78–	23.73–				Jan.	29	27,729.28*
27,729.28	Jan.	30	20.18–	23.66–					Jan.	30	27,685.44*
27,685.44	Jan.	31	261.81LS						Jan.	31	27,423.63*
27,423.63	Feb.	2	1.73–	2.50–					Feb.	2	27,419.40*
27,419.40	Feb.	3	507.67LS						Feb.	3	26,911.73*
26,911.73	Feb.	4	55.17–						Feb.	4	26,856.56*
26,856.56	Mar.	5	63.45–	15.66–					Mar.	5	26,777.45*
26,777.45	Feb.	6	24.86–	8.98–	3.00–						
	Feb.	6	11.29–	42.25–					Feb.	6	26,687.07
26,687.07						Feb.	6	229.08	Feb.	6	26,916.15*
26,916.15	Feb.	7	10.08–	12.25–	.75–				Feb.	7	26,893.07*
26,893.07	Feb.	9	512.83LS			Feb.	9		Feb.	9	26,380.24*
26,380.24	Feb.	10	459.45LS			Feb.	10	25,000			
						Feb.	10	31,570.63	Feb.	10	82,491.42*
82,491.42	Feb.	11	44,325.57LS	.95–					Feb.	11	38,164.90*
38,164.90	Feb.	13	7.83–	35.00–	.65–				Feb.	13	28,121.42*
38,121.42	Feb.	13	10,119.27–						Feb.	13	28,002.15*
28,002.15	Feb.	14	299.57LS						Feb.	14	27,702.58*
27,702.58	Feb.	16	2.15–	52.12–	40.23–				Feb.	16	27,608.08*
27,608.08	Feb.	17	184.10–						Feb.	17	27,423.98*
27,423.98	Feb.	17	42.00–			Feb.	17	9,122.74	Feb.	17	36,504.72*
36,504.72	Feb.	18	1,838.21LS						Feb.	18	34,666.51*
34,666.51	Feb.	19	2,976.65LS			Feb.	19	7,841.44	Feb.	19	39,531.30*
39,531.30	Feb.	20	9,193.65LS						Feb.	20	30,337.65*
30,337.65	Feb.	21	818.07LS						Feb.	21	29,519.58*
29,519.58	Feb.	24	621.84LS			Feb.	24	76.13	Feb.	24	28,973.87*
28,973.87	Feb.	25	923.82LS						Feb.	25	28,050.05*
28,050.05	Feb.	26	92.17LS						Feb.	26	27,957.88*
27,957.88	Feb.	27	1,276.28LS			Feb.	27	8,853.04	Feb.	27	35,534.64*
35,534.64	Feb.	28	13.79–	7.86–	171.50–						
	Feb.	28	.58–						Feb.	28	35,340.91*

203 **DEFENDANT'S EXHIBIT 6.**

The Manufacturers National Bank and Trust Co., Rockford, Ill.

Sheet No. ..... Name Mechanics Universal Joint Co.

Address

Old Balance	Date						1931			1931		
	Balance Brought Forward.....						Feb.	28	35,340.91			
	1931									1931		
	Feb.	28	11,248.83-							Feb.	28	24,092.08*
24,092.08							Mar.	2	3,779.95	Mar.	2	27,872.03*
27,872.03	Mar.	2	112.62LS							Mar.	2	27,759.41*
27,759.41	Mar.	3	1,828.62LS							Mar.	3	25,930.79*
25,930.79	Mar.	4	6,985.03LS							Mar.	4	18,945.76*
18,945.76	Mar.	5	976.87LS							Mar.	5	17,968.89*
17,968.89	Mar.	6	356.45LS							Mar.	6	17,612.44*
17,612.44	Mar.	7	1,145.82LS							Mar.	7	16,466.62*
16,466.62	Mar.	9	2,450.09LS				Mar.	9	174.98	Mar.	9	14,191.51*
14,191.51	Mar.	10	528.99LS							Mar.	10	13,662.52*
13,662.52	Mar.	11	18.12-	6.00-	5.00-					Mar.	11	13,633.40*
13,633.40	Mar.	12	29.45-	3.75-	31.26-							
	Mar.	12	251.30-							Mar.	12	13,317.64*
13,317.64	Mar.	13	5,786.52LS							Mar.	13	7,531.12*
7,531.12	Mar.	14	15.89-	16.42-	4.83-							
	Mar.	14	6.00-							Mar.	14	7,487.98*
7,487.98	Mar.	14	189.00-							Mar.	14	7,298.98*
7,298.98	Mar.	18	618.46LS				Mar.	18	56,127.76			
							Mar.	18	10,000.00	Mar.	18	72,808.28*
72,808.28	Mar.	19	749.78LS							Mar.	19	72,058.50*
72,058.50	Mar.	19	749.79LS				Mar.	19	749.78	Mar.	19	72,058.49*
72,058.49	Mar.	20	34,912.99LS							Mar.	20	37,145.50*
37,145.50	Mar.	21	14.89-	222.29-	6.00-							
	Mar.	21	156.45-	.75-						Mar.	21	36,745.12*
36,745.12	Mar.	23	303.28LS				Mar.	23	5,671.88	Mar.	23	42,113.72*
42,113.72	Mar.	24	324.43LS				Mar.	24	7,757.78	Mar.	24	49,547.07*
49,547.07	Mar.	25	118.62-							Mar.	25	49,428.45*
49,428.45	Mar.	26	173.50-							Mar.	26	49,254.95*
59,254.95	Mar.	27	2,669.70LS							Mar.	27	46,485.25*
46,485.25	Mar.	28	13,202.25LS							Mar.	28	33,282.00*
33,282.00	Mar.	30	229.41-	2.47-	10.73-					Mar.	30	33,039.39*
33,039.39							Mar.	30	9,243.92	Mar.	30	42,283.31*
42,283.31	Mar.	31	2,210.31LS				Mar.	31	1,608.38	Mar.	31	41,681.38*
41,681.38	Apr.	1	12,500.00-	210.79-	25.00-					Apr.	1	28,870.13*
	Apr.	1	75.56-									
28,870.13	Feb.	2	1,887.42LS							Feb.	2	26,982.71*
26,982.71		3	4,000.26LS							Apr.	3	22,982.45*
22,982.45	Apr.	4	1,313.85LS							Apr.	4	21,668.60*
21,668.60	Apr.	6	276.98				Apr.	6	5,429.99	Apr.	6	26,821.61*
26,821.61	Apr.	7	1,949.81LS							Apr.	7	24,871.80*
24,871.80	Apr.	8	612.33LS				Apr.	8	7,900.88	Apr.	8	32,160.35*
32,160.35	Apr.	9	10.79-	159.02-	38.22-					Apr.	9	31,952.32*
31,952.32	Apr.	9	.90-							Apr.	9	31,951.42*
31,951.42	Apr.	10	118.91LS							Apr.	10	31,832.51*
31,832.51	Apr.	11	627.21LS							Apr.	11	31,205.30*
31,205.30	Apr.	13	500.91LS							Apr.	13	30,704.39*
30,704.39	Apr.	13	29,794.03LS				Apr.	14	13,455.68	Apr.	14	14,366.04*
14,366.04	Apr.	15	453.61LS							Apr.	15	13,912.43*
13,912.43	Apr.	16	289.55-	.80-	56.25-							
	Apr.	16	4,544.30-							Apr.	16	9,021.53*

DEFENDANT'S EXHIBIT 7

Bank Statement. In Account with Rfd. Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS.

BANK ACCOUNT

Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
14945	9.60 √			Balance First of Month		———	———	18,218.56
	10,834.71 Book Bal							
	10,844.31 Bank Bal							
				1				
				2				
				3				
				4				
				5				
				6				
				7				
				8				
				9				
				10				
				11				
				12				
				13				
				14				
				15			12,417.68	5,800.88
				16				
				17				
				18				
				19				
				20				
				21				
				22				
				23				
				24				
				25				
				26				
				27		5,033.83		10,834.71
				28				
				29				
				30				
				31				
				Totals				

Checks Outstanding

Bank Balance

Defendant's Exhibit 7.

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DEFENDANT'S EXHIBIT 7

Bank Statement. In Account with Rfd. Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS

Check Number	Amount √
15380	44.10 √
519	1,451.37 √
517	57.42 √
	1,552.89
	22,809.58 Book Bal
	24,362.47 Bank Bal

Check Number	Amount √

BANK ACCOUNT

Day	Description	Deposits √	Checks √	Balance on Hand √
Balance First of Month		———	———	10,834.71
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12		35,000.00		10,834.71
13				
14				
15				
16		17,536.29	11,882.10	16,488.90
17				
18				
19		19,989.33		36,478.23
20				
21				
22				
23				
24			2,416.23	34,062.00
25				
26				
27			11,252.42	22,809.58
28				
29				
30				
31				
Totals				

Checks Outstanding
Bank Balance

DEFENDANT'S EXHIBIT 8

Bank Statement. In Account with Security Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS

Check Number	Amount √	Check Number	Amount √
5594	25.00 √		
5610	42.00 √		
16	70.00 √		
24	25.00 √		
15031	42.95 √		
32	5.03 √		
34	5.64 √		
37	290.71 √		
38	349.52 √		
42	11.25 √		
46	5.00 √		
48	109.76 √		
50	524.97 √		
	1,506.83		
	64,126.79	Book Bal	
	65,633.62	Bank Bal	

BANK ACCOUNT

Day	Description	Deposits √	Checks √	Balance on Hand √
Balance First of Month				24,081.14
1			4,323.09	19,758.05
2				
3				
4				
5				
6		7,450.39 √		27,208.44
7				
8			2,678.06	24,530.38
9		30,000.00 √	5,076.54	49,453.84
10				
11		418.77 √		49,872.61
12				
13				
14				
15			16,653.39	33,219.22
16		8,711.99 √		41,931.21
17				
18		25,000.00 √		66,931.21
19		61,989.24 √	50,000.00	78,920.45
20		10,000.00 √		88,920.45
21				
22				
23				
24				
25			10,654.44	78,266.01
26		16.93 √		78,282.94
27			14,528.93	63,754.01
28				
29		146.01 √		63,900.02
30		262.24 √	35.47	64,126.79
31				
Totals				

Checks Outstanding
Bank Balance

Defendant's Exhibit 8.

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DEFENDANT'S EXHIBIT 8

Bank Statement. In Account with Security Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS

BANK ACCOUNT.

Check Number	Amount √	Check Number	Amount √
5630	65.00		
72	10.00 √		
	75.00		
	85,761.12	Book Bal'	
	85,836.12	Bank Bal	

Day	Description	Deposits √	Checks √	Balance on Hand √
Balance First of Month				64,126.79
1		10,000.00 √	12,500.00	61,626.79
2				
2				
3				
4				
5				
6		1,526.89 √		63,153.68
7				
8				
9				
10		40,689.86	3,809.99	100,033.55
11				
12			49,633.00	50,400.55
13				
14				
15				
16		35,000.00		85,400.55
17				
18				
19				
20		88.07		85,488.62
21				
22				
23				
24	Corr.	272.50		85,761.12
25				
26				
27				
28				
29				
30				
31				
Totals				

Checks Outstanding
Bank Balance

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Statement of Evidence.

DEFENDANT'S EXHIBIT 8.

Bank Statement. In Account with Security Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
5594	25.00			Balance First of Month				
5610	42.00							24,081.14
16	70.00			1			4,323.09	19,758.05
24	25.00			2				
15031	42.95			3				
32	5.03			4				
34	5.64			5				
37	290.71			6		7,450.39		27,208.44
38	349.52			7				
42	11.25			8			2,678.06	24,530.38
46	5.00			9		30,000.00	5,076.54	49,453.84
48	109.76			10				
50	524.97			11		418.77		49,872.61
	1,506.83			12				
	64,126.79	Book Bal		13				
	65,633.62	Bank Bal		14				
				15			16,653.39	33,219.22
				16		8,711.99		41,931.21
				17				
				18		25,000.00		66,931.21
				19		61,989.24	50,000.00	78,920.45
				20		10,000.00		88,920.45
				21				
				22				
				23				
				24				
				25			10,654.44	78,266.01
				26		16.93		78,282.94
				27			14,528.93	63,754.01
				28				
				29		146.01		63,900.02
				30		262.24	35.47	64,126.79
				31				
				Totals				

Checks Outstanding
Bank Balance

Defendant's Exhibit 8.

DEFENDANT'S EXHIBIT 8

Bank Statement. In Account with Security Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
5630	65.00			Balance				
72	10.00			First of Month				64,126.79
	75.00							
	85,761.12	Book Bal		1		10,000.00	12,500.00	61,626.79
	85,836.12	Bank Bal		2				
				3				
				4				
				5				
				6		1,526.89		63,153.68
				7				
				8				
				9				
				10		40,689.86	3,809.99	100,033.55
				11				
				12			49,633.00	50,400.55
				13				
				14				
				15				
				16		35,000.00		85,400.55
				17				
				18				
				19				
				20		88.07		85,488.62
				21				
				22				
				23				
				24	Corr.	272.50		85,761.12
				25				
				26				
				27				
				28				
				29				
				30				
				31				
				Totals				

Checks Outstanding
Bank Balance

DEFENDANT'S EXHIBIT 8

Bank Statement. In Account with Security Nat'l Bank for Month of May, 1931

RECORD OF OUTSTANDING CHECKS

Check Number	Amount √
5594	25.00
5610	42.00
16	70.00
24	25.00
15031	42.95
32	5.03
34	5.64
37	290.71
38	349.52
42	11.25
46	5.00
48	109.76
50	524.97
	1,506.83
	64,126.79 Book Bal
	65,633.62 Bank Bal

Check Number	Amount √

BANK ACCOUNT

Day	Description	Deposits √	Checks √	Balance on Hand √
Balance First of Month				24,081.14
1			4,323.09	19,758.05
2				
3				
4				
5				
6		7,450.39		27,208.44
7				
8			2,678.06	24,530.38
9		30,000.00	5,076.54	49,453.84
10				
11		418.77		49,872.61
12				
13				
14				
15			16,653.39	33,219.22
16		8,711.99		41,931.21
17				
18		25,000.00		66,931.21
19		61,989.24	50,000.00	78,920.45
20		10,000.00		88,920.45
21				
22				
23				
24				
25			10,654.44	78,266.01
26		16.93		78,282.94
27			14,528.93	63,754.01
28				
29		146.01		63,900.02
30		262.24	35.47	64,126.79
31				
Totals				

Checks Outstanding
Bank Balance

Defendant's Exhibit 8.

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DEFENDANT'S EXHIBIT 8

Bank Statement. In Account with Security Nat'l Bank for Month of June, 1931

RECORD OF OUTSTANDING CHECKS				BANK ACCOUNT				
Check Number	Amount √	Check Number	Amount √	Day	Description	Deposits √	Checks √	Balance on Hand √
5630	65.00			Balance First of Month				64,126.79
72	10.00							
	75.00							
	85,761.12	Book Bal		1		10,000.00	12,500.00	61,626.79
	85,836.12	Bank Bal		2				
				3				
				4				
				5				
				6		1,526.89		63,153.68
				7				
				8				
				9				
				10		40,689.86	3,809.99	100,033.55
				11				
				12			49,633.00	50,400.55
				13				
				14				
				15				
				16		35,000.00		85,400.55
				17				
				18				
				19				
				20		88.07		85,488.62
				21				
				22				
				23				
				24	Corr.	272.50		85,761.12
				25				
				26				
				27				
				28				
				29				
				30				
				31				
				Totals				

208 DEFENDANT'S EXHIBIT 9.

Check No. A15194

Mechanics Universal Joint Company
Division of Borg-Warner Corporation
Rockford, Illinois June 15, 1931

To The
Third National Bank
Rockford, Illinois 70-40
Pay to the Order of Mechanics U. J. Co. $6 49 Cts 11 $6.49

MECHANICS UNIVERSAL JOINT COMPANY
E. S. EKSTROM
President
D. W. GUSTAFSON
Secy. Treas.

Checks Outstanding
Bank Balance

Atlas Forgings Company,
1501 South 55th Court,
Cicero, Illinois

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No.	Payee	Amount
15195	American Multigraph Sales Co.	6.00
15196	Amer. Institute of Weights & Measures	25.00
15197	Broadway Laundry Service Co.	1.22
15198	Charles Bruning Co.	13.46
15199	Brown & Sharp Co.	2.38
15200	Jos. Behr and Sons	51.50
15201	Bliss Printing Co.	254.00
15202	Barber-Calman Co.	66.40
15203	Bowen Products Corp.	302.21
15204	D-R-F-Chevrolet Co.	4.75
15205	Colonial Broach Co.	148.00
15206	Continental Desk Co.	6.70
15207	Chilton Class Journal Co.	372.66
15208	Cities Service Oil Co.	32.39
15209	Crucible Steel Co.	214.03
15210	Dwight and M. H. Jackson	16.34
15211	Detroit Gasket and Mfg. Co.	22.51
15212	Felt and Terrant Mfg. Co.	5.25
15213	Fellows Gear Shaper Co.	21.28
15215	Green Bay Barker Machine Works	3.37
15216	Eric J. Gustafson	1.50
15217	Greenlee Bros. Co.	1,541.42

No.	Payee	Amount
15218	Haynes Stellite Co.	51.95
15219	Halcomb Steel Co.	8.33
15220	Ill. Bell Tele. Co.	190.00
15221	Edmund Jackson Co.	5.40
15222	Fred C. Kramer & Co.	23.45
15223	Luebke's Service Station	1.29
15224	Lodge & Shipley Machine Tool Co.	45.00
15225	Leland-Gippert Co.	.62
15226	R. K. LeBond Machine Tool Co.	27.00
15227	LaPointe Machine Tool Co.	50.00
15228	Landish Machine Co.	166.02
15229	Midway Hotel Co.	5.00
15230	Moline Foundry & Machine Co.	26.43
15231	National Twist Drill & Tool Co.	27.77
15232	S. L. O'Connor Co.	2.37
15233	Swords Bros. Co.	916.26
15234	O. K. Tool Co., Inc.	22.99
15235	Otis Elevator Co.	40.00
15236	Postal Telegraph Co.	23.82
15237	Potter and Johnson Machine Co.	16.06
15238	Rockford Consolidated Newspapers, Inc.	15.00
15239	Central Ill. Elec. and Gas Co.	4,857.61
15240	Rockford Gas, Light & Coke Co.	1,667.57
15241	Rockford Printing & Supply Co.	5.36
15242	Rodman Chemical Co.	799.25
15243	Rockford Eagle Furniture Co.	5.00
15244	Rockford Wholesale Grocery Co.	.95
15245	" Northwestern Mallable Co.	10.43
15246	" Power Machinery Co.	11.00
15247	" Drilling Machine Co.	992.60
15248	Society of Automotive Engineers	90.00
15249	E. H. Sargent & Co.	1.37
15250	Skandia Hardware Co.	2.50
210		
15251	Standard Oil Co.	21.15
15252	Siekret and Baum Stationary Co.	2.21
15253	Sundstrand Machine Tool Co.	31.75
15254	Standard Units Part Corp.	27.04
15255	Todd Sales Co.	6.24
15256	United Tire Co.	43.94
15257	Visiting Nurses' Association	17.25
15258	Western Union Tele. Co.	51.57

No.	Payee	Amount
15259	Wilson Bottling Company	2.00
15260	Woodworkers Tool Works	4.24
15261	F. Wittig & Co., Inc.	84.00
15262	C. G. Olson Wood Turning	1.00
15263	Zuck and Eaton	31.40
15264	Swords Elec. Co.	206.90
15265	C. A. S. Engineering Co.	4,854.63

The foregoing list of checks, numbered from 15195 to 15265, excluding 15214, were all dated June 15, 1931, and all bear a sticker, which sticker reads as follows:

"To The Third National Bank
Rockford, Illinois 70-40"

211 DEFENDANT'S EXHIBIT 10.

Deposited With
The Third National Bank
Rockford, Ill.

By Mech Univ Joint Co

6/12/31

All Items are Credited Subject to Payment

Right is reserved and the bank is authorized to forward items for collection or payment direct to the drawee or payor bank, or through any other bank at its discretion, and to receive payment in drafts drawn by the drawee or other banks, and except for negligence, this bank shall not be liable for dishonor of the drafts so received in payment nor for losses thereon.

	Dollars	Cents	Dollars	Cents
Currency				
Gold				
Silver				
Checks	42761	12		

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212 DEFENDANT'S EXHIBIT 11.

Deposited With
~~Security~~ National Bank
RFD.
By Mech Univ Joint Co.
6/12-31

Please List Each Check Separately

	Dollars Cents	Dollars Cents
Currency		
Gold		
Silver		
Checks	35000.00	

Received
Mechanics Universal Joint Co.
Rockford, Ill.
Jul 13 1931

Not Negotiable
Duplicate Deposit Ticket

33
Received by .....

267 And afterwards, to wit, on the Fourth day of December, 1933, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge appears the folowing entry, to wit:

268 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

The Court, having considered the evidence introduced by all parties in interest and having heard arguments of counsel, makes the following

FINDINGS OF FACT.

(1) Plaintiff and all defendants are residents of the Northern District of Illinois, Western Division.

(2) The grounds on which the Court's jurisdiction de-

pends are that the Manufacturers National Bank and Trust Company was a national banking corporation, and was insolvent at the institution of this suit, and is in process of liquidation through the Comptroller of the Currency of the United States, represented by L. B. Achor, Receiver.

(3) The Manufacturers National Bank and Trust Company of Rockford, Illinois, was a national banking corporation, and for many years prior to June 15, 1931, continuously conducted a general banking business in the City of Rockford, Illinois, until the close of business at one thirty o'clock P. M. on Saturday, June 13, 1931, when it never thereafter opened its doors to conduct a banking business.

269 (4) On June 16, 1931, The Comptroller of the Currency of the United States executed and delivered his certificate to the effect that said Manufacturers National Bank and Trust Company was then and there insolvent, and appointed L. B. Achor receiver of said bank.

(5) The Mechanics Universal Joint Company is a corporation duly organized under the laws of the State of Illinois; Eric S. Ekstrom, one of the defendants, was, from June 1, 1931, to June 16, 1931, and before and subsequent to that date, president of the Mechanics Universal Joint Company and active manager of its business and spent all of his business time in connection therewith.

(6) Eric S. Ekstrom was on June 12, 1931 and for two years prior thereto had been, a director of the Manufacturers National Bank and Trust Company, and was acting as such on June 12, 1931, at the time of an informal directors' meeting in said bank held from approximately eleven o'clock A. M. to twelve o'clock noon of said day, and was a director of said bank and acting as such at all meetings of said bank attended by him on June 12, 13 and 14, 1931, but that said Eric S. Ekstrom was not an employee or active officer of said bank, and spent no time and performed no duties at said bank or in connection with its business other than in the capacity of a director. On June 12, 1931 he was, and for more than one year prior thereto, had been a member of the loan committee, a committee of the board of directors.

(7) During the period of two months prior to the closing of the Manufacturers National Bank and Trust Company on June 16, 1931, the defendant, Mechanics Universal Joint Company had deposited in the Manufacturers National Bank and

Trust Company to the credit of its checking account the following amounts opposite the dates as follows:

	May 6, 1931	$ 167.19
	May 9, 1931	28,021.33
	May 15, 1931	24,911.68
	May 18, 1931	25,000.00
	May 23, 1931	534.35
	May 25, 1931	4,163.00
	May 28, 1931	2,928.61
270	May 29, 1931	10,149.61
	May 30, 1931	284.44
	June 1, 1931	10,095.28
	June 6, 1931	44,617.21
	Total	$150,872.70

(8) The balance of the checking account of the Mechanics Universal Joint Company in the Manufacturers National Bank and Trust Company on June 12, 1931 was $65,224.30. The Mechanics Universal Joint Company on June 12, 1931 also had a savings account in the Manufacturers National Bank and Trust Company in the sum of $10,000.00.

(9) On June 12, 1931, and at the time the Manufacturers National Bank and Trust Company closed its doors, Eric S. Ekstrom personally had on deposit in the Manufacturers National Bank and Trust Company the sum of $1,413.88 in a checking account and the sum of $736.89 in a savings account.

(10) The Manufacturers National Bank and Trust Company, on June 12, 1931, and for sometime prior thereto, was and had been on a special list of the Comptroller of the Currency to be examined every ninety days or oftener, which fact was well known to the defendant, Eric S. Ekstrom.

(11) On June 12, 1931, at about eleven o'clock A. M. a meeting of the Board of Directors of the Manufacturers National Bank and Trust Company, called by the president at the request of R. M. Baty, a National Bank Examiner was held at the bank, at which the defendant, Eric S. Ekstrom was present and participated in the proceedings. At said meeting of June 12, 1931, Ekstrom learned from the National Bank Examiner, Baty, that the Security National Bank, another National Banking Association of Rockford, had been drained of its deposits and was unable to continue its business and that there had been a tentative contract entered into by the Security National Bank and the Swedish-Amer-

ican National Bank, still another National Banking Association of Rockford, by which the latter bank might take
271 over the former; that said agreement was subject to the final appraisal by the Swedish-American Bank of the assets of the Security National Bank; that the consummation of the contract was subject to the appraisal; that if the Swedish-American National Bank took over the Security National Bank it would happen Monday morning, June 15, 1931. He learned that it was the opinion of said National Bank Examiner and of the Chief Examiner of the District, that the cash position of the Manufacturers National Bank was extremely low, and that it was the opinion of said Examiner that whether or not there was a take over of the Security Bank there would be a run on the other banks on Monday; that it was the opinion of the said Examiner that the cash position of the Manufacturers Bank was so low that it could not stand a run of one business day.

(12) At the meeting of June 12, 1931 Bank Examiner Baty stated to the Directors in the presence of the defendant, Eric S. Ekstrom, that in view of the continued drain of deposits which the Manufacturers Bank had and were still having, it would be for the best interest of the bank's situation for said bank to try and arrange some place to take their deposit liability under cover. At said meeting the Directors of said bank gave National Bank Examiner, Baty, a letter which authorized said bank Examiner to talk over the affairs of the Manufacturers Bank with a view to having said bank taken over by some other bank in Rockford. Ekstrom was present and consented that Baty should negotiate with some other Rockford bank with a view to a merger.

(13) At the time of the board meeting on June 12, 1931, Ekstrom had knowledge that the Comptroller claimed that the condition of said bank was as shown by a report of an examination of said bank December 1, 1930. Eric S. Ekstrom had examined said report. Accompanying said report there was a letter of the Comptroller of the Currency addressed to said bank, which letter was dated January 8, 1931, both
272 which said report and letter had been read by Eric S. Ekstrom on or about January 13, 1931. Said report and letter showed that, in the opinion of the Comptroller the bank had loans and discounts which were slow assets in the total sum of $1,014,167.09; that the official estimated that there were doubtful loans and discounts to the extent of $228,173.34, and that said official considered there were losses of $138,-

789.96 since the last examination, Exhibit No. 22 being the report on file in the bank.

(14) On said June 12, 1931 Eric S. Ekstrom knew the Comptroller had requested the bank to send him a letter every thirty days, indicating the condition of the bank.

(15) The bank was examined on or about April 27, 1931. A copy of the report of this examination was sent to the bank on or about May 28, 1931, and received about that time. With it there was a letter from the Comptroller dated May 28, 1931. Eric S. Ekstrom saw and examined both said report and said letter. In said report to which the letter of the Comptroller referred, it was shown that the office of the Comptroller claimed there was slow assets in the bank in the sum of $1,145,201.15; that there were total doubtful assets in the bank of $430,821.34; that there had been losses in the last three months in the sum of $19,795.50. It appeared from the report that the Directors of the Bank had liabilities to the bank, direct and indirect, in the sum of $559,620.86.

The letter of the Comptroller dated May 28, 1931 which Eric S. Ekstrom had read, contained the following:

"While it is believed you are cognizant of the extremely unsatisfactory condition of the assets and are trying to work the bank out of its present dangerous situation, conditions are such that little or no progress can be made and the
273 bank is faced with potential losses that threaten its solvency. If you and the active management can be more vigorous in your efforts to liquidate or adjust with adequate security the criticised assets, it is urged that you do so, as only through a successful liquidating and securing program will the desired results be obtained. In connection with the obligation of the Winnebago Securities Corporation, $297,919.96, representing the balance due on the purchase price of $397,919.96 of losses and doubtful assets, $100,000 having been paid in cash, it is observed that $150,000 thereof is classed doubtful. Even though the shareholders contributed $100,000 to capitalize the company and to make the initial cash payment, the mere changing of the form of losses and doubtful assets to notes of the company with no intention of liquidating them except through salvage from the eliminated assets, which the examiner states will not be very large, is not a satisfactory manner in which to rehabilitate the bank and if the notes of the company are not paid promptly when due it will be necessary for the examiner to estimate losses

on the entire obligation, which would have to be charged off or provided for through an assessment against the stock.

"It is observed that losses of $19,795.50 are to be charged off or sold to the securities company prior to June 15. In view of the classification of the company's present obligation, it is in no condition to purchase any further worthless assets and the losses should be promptly charged off against the profits of the bank. Any available cash in possession of the Winnebago Securities Company should be used to liquidate its present indebtedness to the bank.

"Please also note the heavy borrowings of certain of the directors and their concerns, approximately 31% of the total loans and discounts, and to the examiner's statement that some of their lines are the weakest in the bank and heavy losses appear inevitable. This is a condition which should not exist and in fairness to the bank all criticised lines 274 of directors and their concerns should be given immediate attention with a view to collection, substantial reductions or placing in such condition that they are not subject to criticism. Definite results in this regard will be expected."

(16) At the board meeting of June 12, 1931, a committee was appointed by the Directors of the bank to act for the bank in all matters relating to taking over the affairs of the bank by any other bank.

(17) The defendant, Eric S. Ekstrom, left the Directors' Meeting of June 12, 1931 at about the hour of noon. Shortly thereafter he executed as President of the defendant corporation, a check drawn by the defendant corporation on its account at the Manufacturers National Bank, payable to the Third National Bank for the sum of $42,761.12, and caused said check to be sent by mail late in the afternoon of June 12, 1931 to the Third National Bank, Rockford, Illinois. Accompanying the check there was sent to the Third National Bank a deposit slip directing the deposit of said sum in the general account of the defendant corporation at said Third National Bank.

The defendant corporation had never before transferred money from its checking account in the Manufacturers Bank to its general checking account in the Third National Bank.

(18) Said check was received by the Third National Bank on the morning of Saturday, June 13, 1931, and was included in the clearings of said day, and was paid by the Manufacturers Bank of the morning of said day, which was the last day said bank was open for business. By said check the sum

of $42,761.12 was transferred from the general checking account of the defendant corporation in the Manufacturers National Bank to the general checking account of said corporation in the Third National Bank, Rockford, Illinois.

275 (19) On June 12, 1931 after Eric S. Ekstrom left the meeting of the Directors about noon, he also signed a check, at about the same time he signed the foregoing check, for and on behalf of the defendant corporation drawn by said corporation against its general checking account in the Security National Bank, Rockford, Illinois, which said check was in the sum of $35,000.00. Said check was mailed to the Rockford National Bank.

(20) On Saturday night, June 13, 1931, a Committee from the Third National Bank met the committee from the Manufacturers National Bank, and the two committees spent all night examining the assets of the Manufacturers National Bank. This was known to the defendant, Eric S. Ekstrom. He was present during part of the time. Defendant, Eric S. Ekstrom, knew the two companies were valuing the assets and at the conclusion of their work he learned that it would take $750,000.00 in cash to secure a take over by the Third National Bank. He knew that the capital and surplus of the bank and the undivided profits and reserve account was substantially $750,000.00.

(21) On Sunday, June 14, 1931, a resolution was passed by the Board of Directors of the Manufacturers Bank placing the affairs of said bank in the hands of the Comptroller of the Currency.

(22) On Sunday, June 14, 1931 said bank was in fact insolvent and there had been no appreciable change in its condition from June 12, 1931.

(23) During the whole period from June 6, 1931 to June 13, 1931, both days included, said Manufacturers National Bank and Trust Company remained open during each banking day, and on each of said days transacted its usual and ordinary banking business, accepting such deposits as were tendered to it, and on each and every of said days

276 paid all and every demands which were made upon it; that it honored every check drawn upon it by its respective depositors which was presented to it during said days, and paid all checks drawn upon it by its respective depositors which were presented through clearings with other banks on said days, and during said period was able to and did meet all its obligations as they matured.

(24) The Court finds that the payment by the Manufacturers National Bank and Trust Company, of Rockford, Illinois, of the sum of Forty-two Thousand Seven Hundred Sixty-one Dollars and Twelve Cents ($42,761.12), upon check of the defendant, Mechanics Universal Joint Company against its checking account in said bank, and the transfer of said sum to the account of said Mechanics Universal Joint Company, in the Third National Bank of Rockford on June 13, 1931 was not after the commission of an act of insolvency by the Manufacturers National Bank and Trust Company of Rockford, Illinois; that prior to said payment and transfer; the said Manufacturers National Bank and Trust Company of Rockford, Illinois, had committed no act of insolvency.

Upon the above and foregoing findings of fact the court states the following

CONCLUSIONS OF LAW.

(1) The equities are with the plaintiff on the original bill.

(2) The counter claim is without equity and should be dismissed.

(3) The plaintiff is entitled to a decree as prayed for in the bill.

(4) In view of the knowledge possessed by the defendant, Eric S. Ekstrom, which he had acquired because of his confidential connection with the Manufacturers National
277 Bank, when he drew the check of the defendant corporation for $42,761.12, it would be inequitable to allow the defendant corporation to obtain the advantage which it would thereby obtain over other depositors by virtue of the knowledge which its President had acquired as aforesaid.

(5) It is the law that by virtue of the facts above mentioned the defendant, Eric S. Ekstrom, in causing said check to be drawn and paid, said Eric S. Ekstrom being a Director of the Manufacturers National Bank and Trust Company and occupying a confidential relation toward it when he drew said check for $42,761.12, and thereby caused a transfer of funds belonging to the defendant corporation from the Manufacturers Bank to the Third National Bank, then and there intended to prefer the defendant corporation over the other creditors of said bank and intended to prevent the assets of said bank from being distributed ratably, and that his act in so doing was in violation of Section 5242 of the Revised Stat-

utes of the United States, and was an act done in contemplation of insolvency of said Manufacturers Bank.

(6) In a court of equity when the defendant, Eric S. Ekstrom, on behalf of the defendant corporation signed said check and thereby caused a withdrawal of said funds he acted for said corporation, and said corporation was chargeable with what knowledge the defendant Ekstrom then possessed.

(7) Eric S. Skstrom, having personally signed said check and thereby caused a withdrawal of said funds, and said act being for the benefit of the defendant corporation, both said defendant corporation and said Eric S. Ekstrom became liable in a court of equity to return to the Receiver of said Bank, the funds so withdrawn.

(8) The directors of the bank knew its condition to be as found above and placed its officers in position to pay the check in question, drawn by one possessing knowledge of
278 the bank's condition which he acquired because he held a confidential position in the bank and thereby learned facts not known to depositors generally. The payment of the check in fact created a preference and it must be held in law the parties intended the result of their acts.

(9) The funds of the Mechanics Universal Joint Company were not transferred from its checking account in the Manufacturers National Bank and Trust Company in the usual and ordinary course of business.

(10) The Mechanics Universal Joint Company, through its president, Eric S. Ekstrom, who was also a director of the Manufacturers National Bank and Trust Company, knew at the time the several deposits were made by it in the Manufacturers National Bank and Trust Company, that the Manufacturers National Bank and Trust Company was in a precarious and embarrassing financial condition and hence the depositor was not an innocent depositor and no fraud was practised upon such depositor. The counter claim cannot be sustained.

Dated this 4th day of December, A. D. 1933.

CHARLES E. WOODWARD,
Judge.

264 And afterwards, to wit, on the Fourteenth day of July, 1934, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

265 IN THE UNITED STATES DISTRICT COURT. Entered J 14, 1934

* * (Caption) * *

DECREE.

The above entitled cause further came before the court for final decree on this 14th day of July 1934. It appears to the court that heretofore findings of fact and conclusions of law have been signed by the court and have been filed in said cause.

It further appears to the court that four dividends have been ordered and have been paid on general claims, by the Receiver, and that the amounts to which the defendants would be entitled on the sum of $42,761.12 if said last mentioned sum had been allowed as a claim against the said bank and the dates when the same would have been payable are as follows: December 3, 1931, $10,690.28. March 16, 1932, $4,276.11. August 11, 1932, $4,703.72. April 11, 1934, $2,138.06.

The court further finds that giving the defendants credit for the said sums to which the claim would have been entitled as dividends and figuring interest on the respective sums remaining due from time to time from the date of the closing of said bank to the present time at the rate of five percent per annum, and giving credit on the respective dates for the amount of dividends to which the defendants would have been entitled, there is due as interest, the sum of $4,263.50, and that deducting from the principal amount of $42,761.12, the amount of dividends properly applicable thereto, the balance of principal to this date is $20,952.95. A balance of principal and interest in the sum of $25,216.45.

It Is Ordered by the Court as Follows:

1. That A. B. Culhane, Receiver of The Manufactur-
266 ers National Bank and Trust Company, of Rockford, Illinois, successor to L. B. Achor, former Receiver, have and recover of and from the defendants, Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, the sum of $25,216.45, together with interest thereon from this date at the rate of five percent per annum.

2. That said defendants Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom are each hereby ordered and directed by the court within twenty days of this date, to return to the possession of A. B. Culhane, Receiver

f The Manufacturers National Bank and Trust Company of ockford, Illinois, the said sum of $25,216.45, and interest rom this date at the rate of five percent per annum, until his order has been fully complied with.

3. That in addition to any other mode authorized in a court of equity for enforcing this judgment and order, that execution may issue.

4. That the defendants pay the costs of this proceeding to be taxed by the Clerk of this Court.

5. That the execution of this decree be stayed until August 20, 1934.

CHARLES E. WOODWARD,
Judge, United States District Court.

July 14, 1934.

20. 279 And afterwards, to wit, on the Twentieth day of August, 1934, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to-wit:

280 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

The above named defendants, each conceiving himself aggrieved by the decree made and entered on the fourteenth day of July, A. D. 1934, in the above entitled cause, does each hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignments of error which is filed herewith, and each prays that this appeal may be allowed; that an order allowing a joint appeal may be entered herein and that a transcript of the record, proceedings and papers upon which said appeal was made, duly authenticated, may be sent to the United States Circuit Court of Appeal for the Seventh Circuit; that the court will fix the amount of the appeal bond to be filed by defendants and prescribe the time within which the same may be filed, and may stay execution herein until the expiration of the time for filing said appeal bond, or
281 any extension thereof, and order that upon the filing of said appeal bond a supersedeas issue; that the court may fix the time within which defendants may submit and file a

statement of the evidence, in compliance with Equity Rule 75b.

Respectfully
S. R. KENWORTHY,
Attorney for Mechanics Universal Joint Company.
SHELBY L. LARGE,
Attorney for Eric S. Ekstrom.

282 And on, to wit, the Twentieth day of August, 1934, came the Mechanics Universal Joint Company by its attorneys and filed in the Clerk's office of said Court at Freeport a certain ASSIGNMENTS OF ERROR in words and figures following, to wit:

283 IN THE UNITED STATES DISTRICT COURT.
* * (Caption) * *

And now, on the twentieth day of August, A. D. 1934, came the said defendant Mechanics Universal Joint Company, by Shelby L. Large and S. R. Kenworthy, its solicitors; and also came the defendant Eric S. Ekstrom, by Shelby L. Large, his solicitor, and each severally say that the decree in said cause is erroneous and against the just rights of said defendants, and each of them, for the following reasons:

First: Because, as appears from the record in this cause, complainant was not entitled to the decree granted in said cause.

Second. Because, as appears from the record in this cause, a decree should have been entered herein in favor of the defendants on the bill of complaint herein and in favor of defendant Mechanics Universal Joint Company, on its counterclaim herein.

Third: Because, as appears from the record, the statute upon which the bill of complaint was predicated has not been violated by the defendants, or either of them.

284 Fourth: The Court did not find as a fact that on June 12, 1931, at the time the check in question for $42,761.12 was drawn, or on June 13, 1931, when the same was paid by said Manufacturers National Bank and Trust Company of Rockford that said bank was either insolvent or that insolvency was contemplated on either of said dates, nor that said check was paid in contemplation of insolvency.

Finding of fact, Nos. 13, 14, and 15, were erroneous and

were based on incompetent evidence admitted by the Court and objected to by defendants.

The first paragraph of finding of fact No. 17 is erroneous and there is no proof in the record upon which the Court could base said finding and said finding is squarely contradicted by all of the evidence in the record; and there is no proof in the record of any kind or character justifying the finding of the court as contained in the second paragraph of finding No. 17.

Finding of fact No. 18 by the Court, in so far as the Court finds that "said check was received by the Third National Bank on the morning of Saturday, June 13, 1931" is not supported by any evidence in the record and is erroneous.

Finding of fact No. 19 by the Court is erroneous and there is no proof in the record to support the same.

Finding of fact No. 22 by the Court is erroneous and
285 there is no evidence in the record to support the same.

Fifth: Because, as appears from the record, the court erred in finding that the withdrawal by the Mechanics Universal Joint Company of the sum of Forty-two Thousand Seven Hundred Sixty-one Dollars and Twelve Cents ($42,761.12) on the thirteenth day of June, A. D. 1931, was prohibited by the statute upon which said complaint was predicated.

Sixth: Because, as appears from the record herein the Court erred in admitting incompetent evidence produced by plaintiff and objected to by defendants, and in overruling said objections of defendants, and particularly:

(a) The court erroneously admitted Plaintiff's Exhibit 22, being a copy of the bank examiner's report which was forwarded to the bank by the Comptroller of the Currency and covers an examination of the bank up to December 1, 1930.

(b) The Court erroneously admitted Exhibit 23, being a copy of letter addressed by the Bank to the Comptroller of the Currency, under date of February 24, 1931.

(c) The Court erroneously admitted Exhibit 24, being copy of a letter from the Comptroller accompanying the report to the examination of the bank made about April 27, 1931. The letter is dated May 29, 1931 and consists of two pages.

(d) The Court erroneously admitted Exhibit 25, namely, copy of the bank examiner's report sent to the Bank by the Comptroller about May 29, 1931.

286 Seventh: Because, as appears from the record herein, the judgment and decree of the court is against the law.

Eighth: Because, as appears from the record herein, the judgment and decree of the court is contrary to the evidence.

Ninth: Because, as appears from the record herein, the judgment and decree of the court is contrary to the law and the evidence.

Tenth: Because, as appears from the record herein, the court erred in its findings of fact, and in each and every thereof, and in each and every finding of fact so found, ignored the evidence herein to the contrary thereof.

Eleventh: Because, as appears from the record herein, even if the facts be as found by the court in its findings, yet the court erred in rendering a decree in favor of plaintiff and against defendants herein based on such findings.

Twelfth: Because, as appears from the record herein, even if the facts be as found by the court in its findings, yet the decree should have dismissed said bill for want of equity and should have decreed the plaintiff pay to defendant Mechanics Universal Joint Company the sum of $20,034.12 Dollars, together with legal interest, in pursuance of said defendant's counterclaim.

Thirteenth: Because, as appears from the record herein, the court erred in decreeing the plaintiff the sum of Four Thousand Two Hundred Sixty-three Dollars and Fifty Cents ($4,263.50) as interest and in decreeing that defendants pay the same.

287 Fourteenth: Because, as appears from the record the statute upon which plaintiff's cause of action is predicated, does not contemplate a decree for interest be entered.

Fifteenth: Because, as appears from the record the plaintiff's claim is predicated upon a statute, namely, Section 91 of the National Banking Act (R. S. 5242); that the record affirmatively shows that the defendant Mechanics Universal Joint Company did not commit and act prohibited by said statute; nor did the defendant Eric S. Ekstrom obtain any advantage prohibited by said statute.

Sixteenth: The court erred in awarding costs in favor of the plaintiff.

Seventeenth: The decree is contrary to law.

Eighteenth: The decree is contrary to the evidence.

Nineteenth: The decree is contrary to equity.

By reason whereof the defendants pray that the judgment aforesaid may be reversed, etc.

Respectfully

S. R. KENWORTHY,
SHELBY L. LARGE,
Attorneys for Mechanics Universal Joint Company.
SHELBY L. LARGE,
Attorney for Eric S. Ekstrom.

ed Aug. 1934.

288 And afterwards, to wit, on the Twentieth day of August, 1934, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

289 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

This cause came on further to be heard on the twentieth day of August, A. D. 1934, on the joint petition of Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, joint defendants in said cause, praying an appeal from the decree entered herein on the fourteenth day of July, A. D. 1934, and that both of said parties be permitted to join in said appeal, and that in connection with said petition, said petitioners filed herein their joint assignments of error, which said petition was argued by counsel and on consideration thereof

It Is Ordered that the Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, be, and they are hereby granted and allowed a joint appeal from the final judgment and decree entered herein in the above entitled cause on the fourteenth day of July, A. D. 1934, as prayed for; that the said petition and assignments of error be, and the same

290 are hereby filed and petition for appeal be, and the same is hereby allowed, to be reviewed in the United States Circuit Court of Appeals of the Seventh Circuit; that said petitioners shall file an appeal bond in the penal sum of Thirty Thousand Dollars, with 30 days hereof, with sureties to be approved by the Court, conditioned in the usual form, and that execution be stayed until the time for filing such bond, or any extension thereof, may expire, and that said bond, if filed within the time herein fixed, or and future extension thereof, shall operate as a supersedeas; that petitioners shall lodge in the Clerk's office of this court, within 30 days from this date, together with proof for acknowledgment of the plaintiff, or his solicitor, of such lodgment, a statement of evidence in compliance with Equity Rule 75, and that the same, when approved by the court, be filed in the Clerk's office and shall become a part of the record for the purpose of said appeal.

Dated this twentieth day of August, A. D. 1934.

CHARLES E. WOODWARD,
Judge.

291 And on, to wit, the Twenty-eighth day of August, 1934, come Mechanics Universal Joint Co. & Eric S. Ekstrom as principal and Indemnity Insurance Company of N. America as surety, and filed in the Clerk's Office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to wit: Filed Au 1934.

292 Know All Men by These Presents, that we, Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, as principals, and Indemnity Insurance Company of North America, as sureties, are held and firmly bound unto A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Illinois, successor to L. B. Achor, former receiver, in the penal sum of Thirty Thousand & No.....Dollars, to be paid the said A. B. Culhane, his certain attorneys, successors or assigns: To which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this 28th day of August, in the year of our Lord one thousand nine hundred thirty-four.

Whereas, lately in the District Court of the United States for the Northern District of Illinois, Western Division, in a suit pending in said court, between L. B. Achor, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Illinois, as plaintiff, and said Mechanics Universal Joint Company and Eric S. Ekstrom, defendants, a decree was rendered against said Mechanics Universal Joint Company and said Eric S. Ekstrom, and the said Mechanics Universal Joint Company and Eric S. Ekstrom having obtained an appeal and filed a copy thereof in the aforesaid court, and a citation directed to the said A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Illinois, successor to L. B. Achor, former receiver, and admonishing him to be and appear at a session of the

293 United States Circuit Court of Appeals for the Seventh Circuit, to be holden at the City of Chicago, in said Circuit on the ..... day of ....., next.

Now, the condition of the above obligation is such that if said Mechanics Universal Joint Company and Eric S. Ekstrom shall prosecute their appeal with effect, and answer all damages and costs if they fail to make their plea good, then

the above obligation to be void; else to remain in full force and virtue.

MECHANICS UNIVERSAL JOINT CO.
By E. S. EJSTROM (Seal)
Its President.
(Seal) Eric S. Ekstrom (Seal)

Attest
W. A. GUSTAFSON,
Its assistant secretary.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA. (Seal)
By IRA *C.* DARLING,
(Seal) *Agent and Attorney in fact.*

Attest:
EDWARD J. O'DONNELL,
(Seal) *Agent and Attorney in fact.*

Sealed and delivered in presence of:
M. GALLAGHER.

Approved by
CHARLES E. WOODWARD,
United States District Judge.

294 Power of Attorney.
Indemnity Insurance Company
of North America.
Philadelphia.

Know All Men by These Presents: That the Indemnity Insurance Company of North America, a corporation of the State of Pennsylvania, having its principal office in the City of Philadelphia, Pennsylvania, pursuant to the following By-Law, which was adopted by the Board of Directors of the said Company on July 12, 1920, to wit:

"Article XII, Section 1.—The President, or any Vice-President, shall have power and authority to appoint resident Vice-Presidents, resident Assistant Secretaries and Attorneys-in-fact and to authorize them to execute on behalf of the Company and attach the Seal of the Company thereto, bonds and undertakings, recognizances, contracts of indemnity and other writings obligatory in the nature thereof."

does hereby nominate, constitute and appoint William Bartholomay, Jr., Herman Bartholomay, Ira G. Darling, John L. Clarkson, Edward J. O'Donnell and B. F. Corrigan, all of the

City of Chicago, State of Ill., its true and lawful agents and attorneys-in-fact, to make, execute, seal and deliver for and on its behalf, and as its act and deed any and all bonds and undertakings in its business of guaranteeing the fidelity of persons holding places of public or private trust, and in the performance of contracts other than insurance policies, and executing and guaranteeing bonds or other undertakings, required or permitted in all actions or proceedings or by law required or permitted.

All such bonds and undertakings as aforesaid to be signed for the Company by any of the said William Bartholomay, Jr., Herman Bartholomay, Ira C. Darling, John L. Clarkson, Edward J. O'Donnell, or B. F. Corrigan and attested and the Seal of the Company attached thereto by any other one of the said William Bartholomay, Jr., Herman Bartholomay, Ira C. Darling, John L. Clarkson, Edward J. O'Donnell or B. F. Corrigan.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Philadelphia, State of Pennsylvania, in their own proper person.

In Witness Whereof, the said B. Rush, Jr., Vice-President, as hereunto subscribed his name and affixed the corporate seal of the said Indemnity Insurance Company of North America this 12th day of July, 1934.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA
By B. RUSH, JR.
Vice-President.

295 State of Pennsylvania } ss.
County of Philadelphia }

On this 12th day of July A. D. 1934, before the subscriber, a Notary Public of the State of Pennsylvania, in and for the County of Philadelphia, duly commissioned and qualified, came B. Rush, Jr., Vice-President of the Indemnity Insurance Company of North America to me personally known to be the individual and officer described in and who executed the preceding instrument, and he acknowledged the execution of the same, and, being by me duly sworn, deposeth and saith, that he is the officer of the Company aforesaid, and that the seal

affixed to the preceding instrument is the corporate seal of said company, and the said corporate seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation, and that By-Law, Article XII, Section 1, adopted by the Board of Directors of said Company, referred to in the preceding instrument, is now in force.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at the City of Philadelphia, the day and year first above written.

SUNIE E. WEIGAND,
Notary Public.

(Seal)

Approved:
CHARLES E. WOODWARD,
Judge.

Indemnity Insurance Company
of North America,
Philadelphia.

I hereby certify that the Power of Attorney to which this is attached, issued to William Bartholomay, Jr., Herman Bartholomay, Ira C. Darling, John L. Clarkson, Edward J. O'Donnell and B. B. Corrigan of Chicago, Ill., is in full force and effect as of the 28th day of August, 1934.

INDEMNITY INSURANCE COMPANY OF
NORTH AMERICA,
By W. WISE,
Assistant Secretary.

296 State of Illinois.

Department of Insurance.

Whereas, Indemnity Insurance Company of North America, of the City of Philadelphia, in the State of Pennsylvania has furnished the Director of Insurance due proof that such Company is possessed of the qualifications specified in the Act of the General Assembly of the State of Illinois, entitled "An Act to enable corporations created for that purpose to transact a surety business, in this State, and to become the surety on bonds required by law," approved June 8, 1897, and "An Act in relation to the taxation of non-resident corporations,

companies and associations for the privilege of doing an insurance business in this State," approved June 28, 1919.

Now, Therefore, I, the undersigned, Director of Insurance of the State of Illinois, by virtue of authority vested in me by law, do hereby certify that said Company has qualified and is authorized to do business under the said Acts for the ensuing year, ending June 30, 1935.

In Testimony Whereof, I hereto set my hand and cause to be affixed the Seal of my office.

Done at the City of Springfield, this 28th day of June, A. D. 1934.

ERNEST PALMER,
Director of Insurance.

(Seal)

47 And on, to wit, the Eighteenth day of September, 1934 came the defendants by their attorneys and filed in the Clerk's office of said Court at Freeport a certain Notice in words and figures following, to wit: Filed Sep 1934.

48 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

NOTICE.

To Roy F. Hall and C. H. Linscott, Solicitors for the above named plaintiff:

You and each of you are hereby notified that on the 18th day of September, 1934, the defendants lodged in the Clerk's office of the above Court a narrative statement of the evidence in the above entitled cause, and you are further notified that the said defendants will appear before the Honorable Charles E. Woodward, one of the Judges of said Court, in the room then occupied by him as a court-room in the Federal Building in Chicago, Illinois, on the first day of October, A. D. 1934, at ten o'clock A. M., of said date or as soon thereafter as counsel can be heard, and will then ask said Judge to approve said statement, at which time and place you can appear if you so desire and take such action as you desire.

Respectfully,

S. R. KENWORTHY,
Solicitor for Mechanics Universal Joint Company, a corporation.

SHELBY L. LARGE,
Solicitor for Eric S. Ekstrom.

Received copy of said notice this 18th day of Sept., A. D. 1934.

C. H. LINSCOTT,
Solicitors for Plaintiff.

49 And afterwards, to wit, on the 12th day of October, A. D. 1934, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge appears the following entry, to wit:

50 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

And now on motion of the defendants herein, Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, it is hereby ordered that the matter of the settlement of the condensed narrative statement of the evidence be continued and carried over to the October Term of this Court.

Done this 12th day of October, A. D. 1934.

CHARLES E. WOODWARD,
Judge.

15. 51 And on, to wit, the 15th day of October, A. D. 1934 came the Defendants by their attorneys and filed in the Clerk's office of said Court at Freeport a certain PETITION in words and figures following, to wit:

52 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

And now come the defendants herein, Mechanics Universal Joint Company, a corporation, by Samuel R. Kenworthy, its solicitor, and Eric S. Ekstrom, by Shelby L. Large, his solicitor, and move the court for an extension of time of thirty days from the first day of October, 1934, or until the thirtieth day of October, 1934, in which to settle the condensed narrative statement which was lodged with the Clerk of this Court on the eighteenth day of September, 1934, and also move the court for an extension of time of thirty days from the seventeenth day of October, 1934, or until the sixteenth day of

November, A. D. 1934, in which to file the transcript in said cause with the Clerk of the United States Circuit Court of Appeals, and in support of this their said motion show
53 unto the Court the accompanying and annexed affidavit of Samuel R. Kenworthy which is attached hereto and made a part hereof.

Respectfully,
S. R. KENWORTHY,
Solicitor for Mechanics Universal Joint Company.
SHELBY L. LARGE,
Solicitor for Eric S. Ekstrom.

54 IN THE UNITED STATES DISTRICT COURT.
* * (Caption) * *

State of Illinois }
Rock Island County } ss.

SAMUEL R. KENWORTHY, being first duly sworn, on his oath states that he is the solicitor for the defendant Mechanics Universal Joint Company in the above entitled cause and as such has had charge of perfecting the appeal in said above entitled cause.

Affiant further states that there was granted by the Hon. Charles E. Woodward, one of the Judges of this Court, on the eighteenth day of September, 1934, an extension of time in which to file transcript of record with the Clerk of the Circuit Court of Appeals in the above case, extending the time for the filing thereof until October 17, 1934. That thereafter, on the eighteenth day of September, 1934, the defendants
55 lodged with the Clerk of this court a condensed narrative statement of the evidence in the above entitled cause and thereupon on said date served notice on solicitor for the plaintiff in the above entitled cause of such lodgement, and in said notice stated that on the first day of October, 1934, at the courtroom of Judge Charles E. Woodward, in the Federal Building, at Chicago, at the hour of ten o'clock A. M., or as soon thereafter as counsel could be heard, he would ask the said Judge to approve the statement so lodged with said Clerk; that at the time affiant served notice upon the solicitor of said plaintiff he was advised by the solicitor of

said plaintiff that he, said plaintiff's solicitor, might require more time in which to look over said narrative statement than the time mentioned in said notice, and thereupon requested of said affiant that in the event he would need more time that affiant would agree to an extension of time, and affiant advised said solicitor that he would do so; that a few days prior to October 1, 1934, and, as affiant remembers, on the twenty-ninth day of September, 1934, affiant received a telephone communication from his associate, Mr. Shelby L. Large, of Rockford, Illinois, stating that Mr. Roy F. Hall, one of the solicitors for plaintiff, would be unable to be in Chicago before Judge Woodward at ten o'clock A. M. on Monday, October 1, 1934, on account of other business engagements and that Mr. Roy F. Hall had requested of affiant that he meet him at the Great Northern Hotel in Chicago, at three o'clock P. M. on Monday, October 1, 1934, at which time he Hall, was of the opinion that affiant and Hall could get together and agree upon certain modifications of said condensed narrative statement; and that thereupon affiant met said Roy F. Hall at said hotel in Chicago and there-
56 upon said Hall stated that he would be unable because of business engagements to complete his examination of the said condensed narrative statement so lodged with the Clerk as aforesaid, and requested of affiant that he be given a few days in which to look over said condensed narrative statement, and thereupon affiant consented to said extension of time; that affiant heard nothing more from said Roy F. Hall until the eighth day of October, 1934, when he received, by express, from said Roy F. Hall, said narrative statement, together with numerous suggestions for the modification of said statement, and with certain additions thereto. That thereupon, on said eighth day of October, 1934, affiant immediately proceeded to the office of said Roy F. Hall with said narrative statement and said suggestions of amendments thereto so prepared by said Hall and requested of said Hall that affiant and said Hall go into conference to see if said narrative statement could be settled by agreement; that said Hall at said time was engaged in the preparation of a brief in an Appellate Court case, as he so stated, and was pressed for time and requested of affiant that he be given a further extension of time and suggested to affiant that affiant make application to the Hon. Charles E. Woodward, on Tuesday, October 16, at Freeport, Illinois, for an extension of time in which to permit of affiant and said Roy F. Hall attempting

to settle said narrative statement by agreement, said Hall at said time stating that his engagements were such that it would be inconvenient for him to confer with affiant prior to October 16, 1934, said Hall at said time stating to affiant that he would appear before said Hon. Charles E. Woodward,
57 at Freeport, on the sixteenth day of October, 1934 without further notice; that affiant thereafter, on the ninth day of October, 1934, deposited in the United States mail, at Moline, Illinois, a letter addressed to the said Roy F. Hall, and with postage fully prepaid, in which letter affiant, among other things stated: "I am notifying you that the Appellant will appear before Judge Woodward at Freeport on Tuesday, October 16, at the opening of court on said day, or as soon thereafter as counsel can be heard, and will then and there apply to the court for an extension of the time for settling of the narrative statement and for filing of the record with the Circuit Court of Appeals on motion at said date to be presented." That thereafter, on Saturday morning, October 13, 1934, affiant was advised that Judge Woodward would not be at Freeport on Tuesday, October 16, 1934, but that he would hear said motion on Monday, October 15, and thereupon affiant notified the said Roy F. Hall by depositing in the United States Mail, at Moline, Illinois, a letter with postage fully prepaid and addressed to the said Roy F. Hall, notifying said Hall that he would call up said motion for hearing before Judge Woodward at the opening of Court on Octoger 15, 1934, instead of October 16, 1934, and also affiant caused said Roy F. Hall to be notified by telephone that said matter would be heard on the fifteenth instead of the sixteenth of October.

Affiant further states that this application is not made for delay, but because the suggestions of said Roy F. Hall as to amendments and additions to said condensed narrative statement are voluminous and are of such a character that there is a possibility that such amendments and additions can be agreed to be counsel rather than to take the time of the court therein.

58 And further affiant sayeth not.

S. R. KENWORTHY.

Subscribed and sworn to before me by the said Samuel R. Kenworthy, this 15th day of October, A. D. 1934.

W. N. TICE,
Deputy Clerk.

(Seal)

ed Oct. 1934.

59 And afterwards, to wit, on the 15th day of October, A. D. 1934, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

60 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

And now comes the defendant, Mechanics Universal Joint Company, a corporation, by Samuel R. Kenworthy, his solicitor, and also comes Eric S. Ekstrom, defendant, by Shelby L. Large, his solicitor, and move the court for an extension of time from the first day of October, 1934, to the thirtieth day of October, 1934 for the setlling of the condensed narrative statement heretofore lodged with the Clerk of this court in this cause on the eighteenth day of September, 1934; and also move the court for an extension of time from the seventeenth day of October, 1934 to the sixteenth day of November, 1934 in which to file with the Clerk of the United States Circuit Court of Appeals of the Seventh Circuit the transcript of record in said cause.

And also appeared the plaintiff herein by Roy F. Hall, his solicitor, and the court having examined said motion and having heard the arguments of counsel thereon, and being now fully advised in the premises, doth order, adjudge and decree that said motion be allowed; and that the time

61 for the settlement of the narrative statement be extended from the first day of October, 1934 to the thirtieth day of October, 1934, at which latter date, unless the solicitors for the respective parties agree to such modifications or additions to said narrative statement as are desired by said plaintiff, or his solicitor, that said narrative statement be set for settlement before the Hon. Charles E. Woodward, at his courtroom in the Federal Building, in the city of Chicago and State of Illinois, at the hour of ten o'clock A. M. on October 30, 1934; and that settlement of said condensed narrative statement will be then up for hearing without further notice to the respective parties to said cause.

It is further ordered, adjudged and decreed that the time for the filing of the transcript on said appeal with the Clerk of the Circuit Court of Appeals be extended to the sixteenth day of November, 1934.

Done in open court this sixteenth day of October, A. D. 1934.

CHARLES E. WOODWARD,
Judge.

62 And afterwards, to wit, on the 30th day of October, A. D. 1934, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge appears the following entry, to wit: Entered 30, 19

63 IN THE UNITED STATES DISTRICT COURT.
* * (Caption) * *

And now comes the defendant, Mechanics Universal Joint Company, a corporation, by Samuel R. Kenworthy, its solicitor, and also comes Eric S. Ekstrom, defendant, by Shelby L. Large, his solicitor, and move the court for settlement of the Narrative Statement of Evidence which was lodged with the Clerk of this court on September 18, 1934; and it appearing to the court that due notice of the lodgement of said Narrative Statement of Evidence was served upon the solicitor for plaintiff herein and that on the sixteenth day of October, 1934 an Order was entered herein setting the settlement of said Narrative Statement of Evidence for hearing before the undersigned Judge at his courtroom in the Federal Building in the City of Chicago and State of Illinois, at the hour of ten o'clock A. M. on October 30, 1934; and that settlement of said Condensed Narrative Statement of Evidence be taken up for hearing without further notice to the respective parties to said cause; and it further appearing that objections to said Narrative Statement of Evidence and amendments proposed thereto have been presented to the court by the solicitors
64 for plaintiff and the court having examined said objections and amendments so proposed by the said plaintiff, by and through his solicitor, has in certain respects changed by interlineation said Condensed Narrative Statement so lodged with said Clerk and has now so made the same true, complete and properly prepared.

It Is Therefore Ordered, Adjudged and Decreed that said Narrative Statement as changed and amended by interlineation appearing on the face thereof be, and the same is hereby approved.

And It Is Ordered that the same is true, complete and properly prepared in every respect; and the same shall be filed in the Clerk's office of this court as the full, true, perfect and complete record of the evidence in Condensed Narrative Statement form upon which this cause was heard in this court.

Dated this thirtieth day of October, A. D. 1934.

CHARLES E. WOODWARD,
Judge.

304 And on, to wit, the Seventeenth day of September, 1934 came the defendants by their attorneys and filed in the Clerk's office of said Court at Freeport, a certain MOTION FOR EXTENSION OF TIME AND AFFIDAVIT, in words and figures following, to wit:

305 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption) * *

And now come the defendants (appellants), Mechanics Universal Joint Company, a Corporation, by Samuel R. Kenworthy, its solicitor, and Eric S. Ekstrom, by Shelby L. Large, his solicitor, and move the Court for an extension of time of thirty (30) days (or until October 19, 1934) in which to file the transcript of record in the Circuit Court of Appeals; and also said defendants (appellants) move the Court for leave to file instanter the praecipe for record with the Clerk of this Court and to serve instanter upon the opposing counsel a copy of said praecipe, and that the time be extended in which the plaintiff (appellee) shall file with the Clerk his praecipe for any additional matters for ten (10) days from the granting of this application, if the same should be allowed, and for cause of said motion the defendants (appellants) submit to the court the accompanying and annexed affidavit of Samuel R. Kenworthy.

SAMUEL R. KENWORTHY,
Solicitor for Mechanics Universal Joint Company, a corporation, defendant.
SHELBY L. LARGE
Solicitor for Eric S. Ekstrom, defendant.

306 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption) * *

State of Illinois }
County of Cook. } ss.

SAMUEL R. KENWORTHY, being first duly sworn, on oath states that he is the solicitor for the Mechanics Universal Joint Company, a corporation, one of the defendants in the above entitled cause, and that at the time of the entering of the decree herein, on July 14, 1934, he was selected by both of said defendants (appellants) to prepare said cause for appeal in the United States Circuit Court of Appeals, for the Seventh Circuit.

Affiant further states that he was severely injured in an automobile accident of the 29th day of May, A. D. 1934, and was continuously confined to the hospital and his home until approximately the 1st day of August, 1934; that immediately thereafter he undertook to prepare said cause for appeal and that on the 20th day of August, 1934, he presented to this Court his petition for appeal accompanied by an assignment of errors, and there was issued out of this Court on said day a citation which was duly served upon counsel for plaintiff (appellee); that immediately after the said 20th day of August, 1934, this affiant suffered a relapse and became un-
307 able to attend to his duties at his office, but that he expected said relapse was temporary and that he would be able to complete said appeal; that during the time of said relapse, affiant inadvertently overlooked Rule 13 of the Circuit Court of Appeals which requires the filing of a praecipe for record with the Clerk of this Court within fifteen (15) days from the allowance of said appeal and the service of a copy of said praecipe on the attorneys of record for the plaintiff within ten (10) days from the allowance of said appeal and that said time has gone by in which to file said praecipe.

Affiant further states that he has had exclusive charge of said record for appeal and that Shelby L. Large, of Rockford, Illinois, has depended upon this affiant to get said cause and said appeal perfected.

Affiant further states that he has just completed the narrative statement with the exception of the checking of some exhibits that were introduced in evidence, which exhibits have

not been available to affiant but are all lodged, as affiant believes, in the City of Rockford, Illinois, and affiant expects to have said narrative statement, together with such exhibits as defendants (appellants) deem material, ready for lodgment with the Clerk of this Court and for service of copy upon opposing counsel within a very few days.

Affiant further states that the record is of considerable length that even if the praecipe above mentioned had been filed and served within the time prescribed by the rules of said Circuit Court of Appeals, that there would not have been time for the settlement of said narrative, printing of the record and incorporation of briefs so that said cause could have been submitted at the October session of said Circuit Court of Appeals, and that the delay will not in any manner harm the appellee in said cause; that ample bond has been given to cover any accumulation of interest on
308 said decree, that said decree is a money decree; and that if said decree is affirmed any reasonable delay occasioned thereby will be covered by the appeal bond now on file in this cause.

This affiant further states that this application is not made for delay but that justice may be done.

And further affiant saith not.

SAMUEL R. KENWORTHY

Subscribed and sworn to before me this 13th day of September, A. D. 1934.

META SCHMIDT
Notary Public.

(Seal)

309 And afterwards, to wit, on the Seventeenth day of September, 1934, being one of the days of the regular April term of said Court, in the record of procedeings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge appears the following entry, to wit:

310 IN THE DISTRICT COURT OF THE UNITED STATES. Entered 17, 1

* * (Caption) * *

ORDER.

This cause coming on to be heard on the motion of defendants (appellants) for an extension of time in which to file transcript of record and docketing said appeal with the Circuit Court of Appeals for the Seventh Circuit, and also upon motion that the praecipe for record be filed as of this date and that a copy of said praecipe be served upon counsel for plaintiff (appellee) as of this date, and it appearing to the Court that due notice of said motion was served by mail upon counsel for plaintiff (appellee) on the 13th day of September, A. D. 1934, together with copy of the praecipe for record, copy of said motion and copy of the proposed order thereon, and the Court having examined said motion and accompanying affidavit, and finds that said motion is well taken;

It Is, Therefore, Ordered that said motion of said appellants be and the same is hereby allowed; that the time for the filing of said transcript of record and the docketing of said appeal be extended to and including October 19, 1934; and that the time for the filing of the praecipe of record and service of copy thereof on counsel for appellee be extended to the date of the date of this order.

Dated this 17 day of September, 1934.

CHARLES E. WOODWARD
Judge.

300 And on, to wit, the Eighteenth day of September, 1934 came the Defendants by their attorneys and filed in the Clerk's office of said Court at Freeport a certain Praecipe in words and figures following, to wit: Filed 1934

301 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

PRAECIPE.

To the Clerk of said Court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to an appeal allowed in the above entitled

ause, and to include in such transcript of record the follow-
ng and no other papers or exhibits, to wit:
t 1. The Complaint in the above entitled cause.
a 2. The demurrer of the defendant Mechanics Universal
Joint Company to said Complaint.
3. The demurrer of the defendant, Eric S. Ekstrom to said Complaint.
4. The order of the Court overruling said demurrer.
5. The answer of defendant Mechanics Universal Joint Company to said Complaint.
6. The answer of defendant Eric S. Ekstrom to said Complaint.
302 7. The amended counterclaim of defendant Mechanics Universail Joint Company.
8. The answer of plaintiff to said amended counterclaim.
9. The order of court setting said cause for hearing on the proofs then to be made.
10. Notice of lodging of narrative statement of evidence and of time of proposed settlement thereof.
11. The narrative statement of evidence certified to by the clerk.
12. Order approving statement of evidence.
13. The decree of the court entered herein on the 14th day of July, A. D. 1934, and the exceptions of the defendants thereto.
14. The findings of fact and conclusions of law of the Court.
15. The petition for appeal herein filed by defendants on the 20th day of August, A. D. 1934.
16. The assignments of error filed herein by the defendants on the 20th day of August, A. D. 1934.
17. The order of the court allowing said appeal.
18. The appeal bond filed herein.
19. Citation and acknowledgment of service.
20. This praecipe.
21. Motion and affidavit for enlargement of time of filing praecipe and docketing appeal and filing of transcript on appeal.
22. Order allowing extension of time for filing praecipe, docketing appeal, and filing transcript on appeal.
23. Certificate of Clerk.

Respectfully,

SAMUEL R. KENWORTHY
SHELBY M. LARGE
Attorneys for Appellant.

Received copy of the above praecipe this 18th day of September.

C. H. LINSCOTT
Attorney for Appellee.

303 State of Illinois } ss.
County of Cook }

SAMUEL R. KENWORTHY, being first duly sworn, on oath states that he served the foregoing praecipe upon Roy Hall and C. H. Linscott, of Rockford, Illinois, attorneys for the plaintiff-appellee, by mailing to each of said attorneys, at said address, in properly stamped and addressed envelopes, a copy of said praecipe, and depositing said envelopes in the United States mails at Chicago, Illinois, on the 13th day of September, 1934.

SAMUEL R. KENWORTHY

Subscribed and sworn to before me this 13th day of September, 1934.

FRANCES SAVAGE
Notary Public.

311 Northern District of Illinois } ss:
Western Division }

I, Charles M. Bates, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled L. B. Achor, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Ill., Plaintiff, *vs.* Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, Defendants, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Freeport, in said District, this 7th day of November, A. D. 1934.

CHARLES M. BATES
Clerk.

(Seal)

297 And on, to wit, the Twenty-fifth day of August, 1934, came the defendants by their attorneys and filed in the Clerk's office of said Court at Freeport, a certain CITATION in words and figures following, to wit:

298 IN THE UNITED STATES DISTRICT COURT.

* * (Caption) * *

The President of the United States, to the above named complainant, A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Illinois, successor to L. B. Achor, former receiver, and all others similarly situated, and to Roy S. Hall, their attorney, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Seventh Circuit, to be held in the City of Chicago, in the State of Illinois, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the District Court for the Northern District of Illinois, Western Division, wherein L. B. Achor, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Illinois, complainant, and Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, are defendants, to show cause, if any there be, why the judgment and decree in such appeal should not be corrected and speedy justice should not be done in that behalf.

299 Witness the Honorable Charles E. Woodward, Judge of the United States District Court for the Northern District of Illinois, Western Division, this twentieth day of August, A. D. 1934.

CHARLES E. WOODWARD,
Judge.

Service of the within citation and receipt of copy thereof admitted this 21st day of August, A. D. 1934.

ROY F. HALL,
C. H. LINSCOTT
Attorney and Solicitor for Appellee.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing Printed pages, numbered from 1 to 218, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-eighth day of December, 1934, and used and considered at the hearing and on the determination of the following entitled cause:

Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom,

Appellants,

vs.

A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, Successor to L. B. Achor, Former Receiver, and all others similarly situated,

Appellee,

No. 5384, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 10th day of February, A. D. 1936.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the second day of October, 1934, of the October Term, in the year of our Lord one thousand nine hundred and thirty-four, and of our Independence the one hundred and fifty-ninth.

Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom,
Appellants,
5384 *vs.*
A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, etc.,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

And afterwards, to-wit: On the twentieth day of April, 1935, there was filed in the office of the Clerk of this court, a Certified copy of Second Amended Counterclaim of Mechanics Universal Joint Company, and Plaintiffs Reply thereto, which said Certified Copy is in the words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Western Division.

A. B. Culhane, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. Achor Receiver, etc., *Plaintiff*, *vs.* Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, *Defendants.*	In Equity, No. 348.

Be It Remembered, That on the 29th day of April, 1932, there was filed by the defendant the Mechanics Universal Joint Company, in the Office of the Clerk of said Court in the above entitled cause, a Second Amended Counterclaim, which is in words and figures as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Western Division.

L. B. Achor, Receiver of the Manufacturers National Bank and Trust Company, of Rockford, Illinois, *Plaintiff*. *vs.* Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom, *Defendants.*	In Equity, No. 348.

SECOND AMENDED COUNTERCLAIM OF THE MECHANICS UNIVERSAL JOINT COMPANY.

Now Comes the Mechanics Universal Joint Co., a corporation, one of the defendants herein, and pursuant to leave of

court first had and obtained on the 27th day of April, 1932, files this, its second amended counterclaim to the claim of the plaintiff filed in this cause:

Amended Counterclaim.

And the Mechanics Universal Joint Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office and place of business in Rockford, in the State of Illinois, and in this District, by way of a cross-bill herein against the plaintiff above mentioned, and also by way of counterclaim and further answer, avers as follows:

I.

That continuously from the first day of January, 1931, down to and including the thirteenth day of June, 1931, The Manufacturers National Bank & Trust Company, of Rockford, Illinois, was a national banking corporation organized and existing under and by virtue of the laws of the United States, and that during said period it maintained a banking house in the city of Rockford, in the state of Illinois, in said District, and in said banking house conducted a banking business and during the whole of said period kept its bank open continuously during banking days and banking hours and by such action represented to the public that it was a solvent, going, banking institution and a safe place in which to deposit money; that during the whole of said period said bank was, in fact, insolvent.

II.

That the Mechanics Universal Joint Company, a corporation, as aforesaid, relying upon the representations so made by the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, in keeping its Bank open and doing business and relying upon the representation thereby made that said Bank was solvent and then and there believing that said bank was solvent, made deposits of its money and of its checks and bills of exchange in said Bank during said months of May and June, 1931, as follows:

Date	Deposits
May 6th,	$ 167.19
May 9th,	28,021.33
May 15th,	24,911.68
May 18th,	25,000.00
May 23rd,	534,35
May 25th,	4,163.00
May 28th,	2,928.61
May 29th,	10,149.61
May 30th,	284.44
June 1st,	10,095.28
June 6th,	44,617.21

And all of which said deposits were received by the said The Manufacturers National Bank & Trust Company, of Rockford, Illinois, as deposits of cash at said respective times.

III.

That at the time the said respective deposits were received by the said Bank on the respective dates as stated aforesaid, the said Bank was knowingly insolvent and that throughout the period of time said respective deposits were received by said Bank, the active officers in charge of, and daily managing and directing its banking business, were aware of, and knew, its actual condition of insolvency throughout said period of time, and the account of the said Mechanics Universal Joint Company was credited on the books of the said Bank to the credit of the said Mechanics Universal Joint Company, all of which said deposits so solicited and received by said Manufacturers National Bank & Trust Company of Rockford, Illinois, under the circumstances aforesaid, and when said Bank was knowingly insolvent, and when the active officers in charge of, and daily managing and directing its banking business, were aware of, and knew, its actual condition throughout such period, constituted a fraud upon the said Mechanics Universal Joint Company and that by reason of said fraud so perpetrated by the said Manufacturers National Bank & Trust Company of Rockford, Illinois upon the said Mechanics Universal Joint Company, the title to the said sums of money so represented by said deposits never passed to the Manufacturers National Bank & Trust Company of Rockford, Illinois, but in law remained in the

Mechanics Universal Joint Company, and still remains in the said Mechanics Universal Joint Company, and the same was received by the said L. B. Achor, the said Receiver of said Bank, as a trust fund which in equity belongs to, and is the property of, this defendant; and that there remained in the said Manufacturers National Bank & Trust Company of Rockford, Illinois on the 15th day of June, 1931, at which time the said Receiver was appointed and took over the assets of said Bank, credited to the account of this defendant the sum of Twenty thousand, thirty-four dollars and twelve cents ($20,034.12) all of which had been deposited when said Bank was insolvent and when the active and managing officers in charge of, and daily managing and directing its banking business, were aware of, and knew, its actual insolvent condition throughout said period, and which in equity and in good conscience by reason of the circumstances under which said deposits were made, belonged to, and is, the property of this defendant and should be paid to this defendant before the assets of said Bank in the hands of said Receiver are distributed to the general creditors of said Bank.

IV.

That the plaintiff in this cause has alleged in his bill of complaint filed herein that when the said Manufacturers National Bank & Trust Company suspended its banking operations and was closed by the Comptroller of Currency of the United States, said Bank was insolvent; that this defendant states that the said The Manufacturers National Bank & Trust Company was in the same financial condition with reference to its ability to pay its debts and obligations including all of its depositors throughout the entire period from May 6, 1931 to June 15, 1931, the date when it suspended, as it was on the day of its suspension, and that if, as alleged by the plaintiff in said bill of complaint it was insolvent at the time that it suspended, that is, on June 15, 1931, the Mechanics Universal Joint Company avers that it was continuously insolvent throughout the period from and including May 6, 1931 to June 15, 1931, and that throughout that period of time the active and managing officers, to-wit: the President, the Vice-Presidents, the Cashier and Assistant Cashiers, who were in charge of, and daily managing and directing the banking

business of said Bank, were aware of, and knew, its actual insolvent condition throughout said period.

V.

That at the time of the closing of said Bank and at the time the assets therefor were received by the Receiver herein, there was as assets of said Bank so received by said Receiver the sum of, towit: Four hundrd thousand dollars ($400,000.00) in cash, which said cash included the said sum of Twenty thousand, thirty-four dollars and twelve cents ($20,034.12) so deposited by said defendant under the circumstances in this counterclaim hereinabove enumerated.

Wherefore, the Mechanics Universal Joint Company aforesaid, prays that an accounting may be taken in this behalf and that in and by such accounting it be determined what funds and moneys and property of the Mechanics Universal Joint Company were deposited by said Mechanics Universal Joint Company in the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, at the time or times when said Bank was insolvent, and when the active and managing officers in charge of, and daily managing and directing the Banking business of said Bank were aware of, and knew, its actual insolvent condition, and when said Bank was holding itself out to the public as a solvent, going, institution by keeping its banking house open for the conduct of a banking business and for the reception of deposits, and that a decree may be entered herein against the said plaintiff, L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, ordering and directing him, out of the funds and assets in his hands as such Receiver, to pay to the Mechanics Universal Joint Company such sum of Twenty thousand, thirty-four dollars and twelve cents ($20,034.12), together with legal interest thereon from the date of deposit of the same, before making distribution of any of the assets of the said The Manufacturers National Bank and Trust Company, of Rockford, Illinois, to the general creditors thereof; and that this defendant may have such other and further relief in the premises as equity may require and to your Honor shall seem meet.

Wherefore, this defendant prays that the said bill of complaint be dismissed as against it, and that it be awarded such

relief as it may be entitled to under and by virtue of said cross bill and counterclaim.

MECHANICS UNIVERSAL JOINT COMPANY,
By R. E. GUSTAFSON,
Asst. Sec.

KENWORTHY, SHALLBERG & HARPER,
per Sh.
Moline, Ill.
LARGE & RENO,
Rockford, Ill.
Attorneys for said Defendant,
Mechanics Universal Joint Co.

Be It Further Remembered, That on the 4th day of May, 1932, the plaintiff filed in the above entitled cause a reply to said Second Amended Counterclaim, which reply is in words and figures, as follows, to-wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Western Division.

L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, *Plaintiff,* *vs.* Mechanics Universal Joint Company, a Corporation, and Eric S. Ekstrom.	In Equity, No. 348.

REPLY OF PLAINTIFF TO SECOND AMENDED COUNTERCLAIM OF MECHANICS UNIVERSAL JOINT COMPANY, ETC.

The plaintiff, L. B. Achor, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, for reply to the second amended counterclaim of the Mechanics Universal Joint Company, says:

1. The plaintiff admits all of the matters stated in Para-

graph I. thereof, except the conclusions of the defendant contained in the following words, "And by such actions represented to the public that it was a solvent, going banking institution and a safe place in which to deposit money," and says that as to said conclusions he neither admits nor denies the same, but calls for strict proof; and denies that during the whole of said period said bank was in fact insolvent.

2. The plaintiff denies each and every of the allegations in Paragraph II of said second amended counterclaim.

3. Plaintiff denies each and every of the allegations contained in Paragraph III of said second amended counterclaim.

4. Plaintiff denies each and every of the allegations contained in Paragraph IV. of said second amended counterclaim.

5. Plaintiff denies all of the matters and things contained in Paragraph V of said second amended counterclaim.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois,

Western Division.

A. B. Culhane, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. Achor, Receiver, etc.,

Plaintiff,

vs.

Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom,

Defendants.

In Equity, No. 348.

State of Illinois, } ss.
County of Stephenson. }

I, Henry W. Freeman, Clerk of the United States District Court, Northern District of Illinois, do hereby certify that the above and foregoing, is a full, true and correct copy of the Second Amended Counterclaim filed by the defendant

Mechanics Universal Joint Company, a corporation in the Office of the Clerk of the United States District Court for the Northern District of Illinois, Western Division on April 29, 1932; that the original remains among the files in said cause in said Office, and that the above and foregoing is a full, true and correct copy of a Reply to said Second Amended Counterclaim filed in said Division and District, by the plaintiff in said cause in said Office on May 4, 1932, and that the original remains in the files of said Office in said cause.

In Testimony Whereof, I have hereunto set my hand and caused the Seal of said Court to be affixed at Freeport, Illinois, this 10th day of April, A. D. 1935.

HENRY W. FREEMAN,
(Seal) *Clerk of said Court.*
By W. N. TICE,
Deputy.

Endorsed: Filed April 20, 1935. Frederick G. Campbell, Clerk.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, began and held in the United States Court Room in the City of Chicago, in said Seventh Circuit, on the first day of October, 1935, of the October Term, in the year of our Lord one thousand nine hundred and thirty-five, and of our Independence the one hundred and sixtieth.

And afterwards, to-wit: On the seventeenth day of October, 1935, the following further proceedings were had and entered of record, to-wit:

Thursday, October 17, 1935.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Charles G. Briggle, District Judge.

Mechanics Universal Joint Company, *et al.*,
5384 *vs.*
A. B. Culhane, Receiver, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. S. R. Kenworthy, Counsel for Appellants, and by Mr. Roy F. Hall, Counsel for Appellee, and the court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the fifteenth day of November, 1935, there was filed in the office of the Clerk of this court, the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5384. October Term and Session, 1935.

MECHANICS UNIVERSAL JOINT COMPANY, a Corporation, and ERIC S. EKSTROM,

Appellants,

vs.

A. B. CULHANE, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. ACHOR, former Receiver, and all others similarly situated,

Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

November 15, 1935.

Before SPARKS and ALSCHULER, *Circuit Judges*, and BRIGGLE, *District Judge*.

SPARKS, *Circuit Judge*. This suit in equity was originally instituted against appellants by appellee's predecessor as receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois. By it, appellee sought to recover the sum of $42,716.12 paid by said Manufacturers Bank to the Third National Bank as and for a deposit in the Third National to the appellant company's credit. The money was paid on a check of appellant company drawn upon the Manufacturers Bank. The check was drawn the day before the Manufacturers Bank finally closed its doors, and was paid through the clearing house of Rockford on the day that bank was finally closed. Appellant filed its cross complaint by which it sought to recover the balance of its deposit in the sum of $20,034.12, which appellant charges was fraudulently received by the bank and its officers and agents at times when they all knew the bank was insolvent.

The court found the facts specially and rendered its conclusions of law thereon. In addition to the proper jurisdictional facts the court found substantially as follows:

The Manufacturers Bank closed its doors at one thirty P. M., June 13, 1931, its regular time of closing on Saturdays, and never thereafter opened its doors. On June 16, 1931, the Comptroller of the Currency certified that the bank was insolvent and appointed Achor, its former vice-president, as receiver. The Mechanics Company, appellant, is an Illinois corporation of which, for some time prior to and at all times since June 1, 1931, appellant Ekstrom was the president and active manager, spending all of his business time in connection therewith. For two years prior to June 16, 1931, he had been a director of the Manufacturers Bank. He was not an employee of the bank and spent no time and performed no duties there or in connection with its business, other than as director and as a member of the board's loan committee.

Between May 6, 1931, and June 6, 1931, the Mechanics Company had deposited with the Manufacturers Bank various sums and on various dates in the total amount of $150,872.70, and its checking account balance on June 12, 1931, was $65,224.30. It also had a savings account in the same bank on that date of $10,000. When the bank closed its doors appellant Ekstrom had a personal checking account therein of $1,413.88, and a savings account of $736.89.

On the date the bank closed it was, and for some time prior thereto had been, on a special list of the Comptroller of the Currency for examination every ninety days or oftener, of which fact Ekstrom had knowledge. At about eleven o'clock A. M., June 12, 1931, a meeting of the board of directors of the Manufacturers Bank, called by its president at the request of Mr. Baty, a national bank examiner, was held at the bank at which appellant Ekstrom was present and participated. He there learned from Baty that the Security National Bank of Rockford was unable to continue business and had made a tentative contract with the Swedish American National Bank of Rockford, by which the latter was to take over the former, subject to the appraisal of the former's assets by the latter, and if that appraisal were satisfactory the transfer would be made on Monday morning, June 15, 1931. Ekstrom was also there informed by Baty that it was the latter's opinion that the cash position of the Manufacturers Bank was extremely low and could not stand a run of one business day, and that he thought a run on all the banks would occur on Monday

whether or not the Security Bank was taken over by the Swedish Bank. It was there stated by Baty in the presence of Ekstrom that in view of the continued drain of deposits which the Manufacturers Bank had and was still having, it would be for the best interests of the bank to try to arrange to take the bank's deposit liability under cover. Whereupon the board of directors, with Ekstrom's consent, gave Baty written authority to talk over the affairs of the bank with some other Rockford bank with a view to having the latter take it over. At that meeting Ekstrom knew of the contents of the Comptroller's report of an examination of their bank on December 1; 1930, and he was fully acquainted with the Comptroller's letter of January 8, 1931, which accompanied the report. In that report and letter the Comptroller gave it as his opinion that the bank had loans and discounts which were slow assets in the sum of $1,014,167.09; tthat there were doubtful loans and discounts to the extent of $228,173.34; and that there were losses since the last examination in the sum of $138,789.96. On June 12, 1931, Ekstrom knew that the Comptroller had requested the bank to send him a letter every thirty days indicating its condition.

The bank was examined about April 27, 1931, and a report of it, together with a letter from the Comptroller, was sent to and received by the bank on or about May 28, 1931, and both were examined by Ekstrom. The report disclosed that there were slow assets in the sum of $1,145,201.15, and total doubtful assets of $430,821.34, and losses within the last three months of $19,795.50. It further disclosed that the directors had direct and indirect liabilities in the bank of $559,620.86. The letter referred to the condition of the bank as unsatisfactory and dangerously threatening its insolvency and it demanded the directors' immediate attention.

At the board meeting of June 12, a committee was appointed by the directors to act for the bank in all matters relative to taking over its affairs by any other bank. Ekstrom left that meeting about noon, and shortly thereafter executed, as president of appellant, the check which is now in controversy, and caused it to be sent by mail late in the afternoon of that day to the Third National Bank of Rockford. Accompanying it was a deposit slip directing its deposit in appellant's general account at the Third National Bank. Theretofore, appellant had never transferred money from its checking account in the Manufacturers Bank to its general checking account in the Third National Bank. The check was received by the Third

National on Saturday morning, June 13, and was included in the clearings of that day. It was paid by Manufacturers Bank on the same morning, which was the last day that bank was open, and the amount thus paid was deposited as ordered by appellant with the Third National.

About the time Ekstrom signed this check he also signed, as president, another check on behalf of appellant for $35,000, drawn by it against its general checking account in the Securities National Bank of Rockford, and it was mailed to the Rockford National Bank.

On Saturday night, June 13, a committee from the Third National, and a like committee from the Manufacturers Bank spent the entire night examining the assets of the latter bank. That fact was known by Ekstrom and he was present at the time, and he learned at the conclusion of their examination that it would take $750,000 in cash to effect a merger with the Third National. He also knew that that amount substantially corresponded to the capital, surplus, and the undivided profits of the Manufacturers Bank.

On Sunday, June 14, the Manufacturers Bank was insolvent, and by resolution of the board its affairs were placed in the hands of the Comptroller. There had been no appreciable change in its condition from June 12, 1931. From June 6 to June 13, 1931, inclusive of both days, the bank remained open and transacted its usual and ordinary banking business, accepting deposits and paying all checks drawn upon and presented to it, and during that time it was able to and did meet all its obligations as they matured. The court found that prior to the payment of the controverted check, the bank had committed no act of bankruptcy.

The court therefore concluded that the equities of the cause were with appellee, and that the cross complaint was without equity.[1] It accordingly dismissed the cross complaint, and awarded a decree for appellee against both appellants in the sum of $25,216.45, with interest and costs. That amount represented the full amount of appellee's claim less four dividends which had theretofore been ordered.

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1. CONCLUSIONS OF LAW.

"(1) The equities are with the plaintiff on the original bill.

"(2) The counter-claim is without equity and should be dismissed.

"(3) The plaintiff is entitled to a decree as prayed for in the bill.

"(4) In view of the knowledge possessed by the defendant, Eric S. Ekstrom, which he had acquired because of his confidential connection with the Manufacturers National Bank, when he drew the check of the defendant corporation for $42,761.12, it would be inequitable to allow the defendant

Appellants contend that the bill sought a recovery under section 5242 Revised Statutes (12U.S.C.A. section 91) which provides that there can be no recovery under that section unless the payment in question was made after the bank had committed an act of insolvency, or in contemplation thereof with a view to prevent the application of its assets in the manner prescribed by the Banking Act or with a view to the preference of one creditor to another. They insist, therefore, that the decree was not justified because (1) the bank had committed no act of insolvency before the payment of the check, (2) there was no proof of insolvency, (3) none of the officers of the bank believed that the bank was insolvent when

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corporation to obtain the advantage which it would thereby obtain over other depositors by virtue of the knowledge which its President had acquired as aforesaid.

"(5) It is the law that by virtue of the facts above mentioned the defendant, Eric S. Ekstrom, in causing said check to be drawn and paid, said Eric S. Ekstrom being a Director of the Manufacturers * * * and occupying a confidential relation toward it when he drew said check for $42,761.12, and thereby caused a transfer of funds belonging to the defendant corporation from the Manufacturers Bank to the Third National Bank, then and there intended to prefer the defendant corporation over the other creditors of said bank and intended to prevent the assets of said bank from being distributed ratably, and that his act in so doing was in violation of Section 5242 of the Revised Statutes of the United States, and was an act done in contemplation of insolvency of said Manufacturers Bank.

"(6) In a court of equity when the defendant, Eric S. Ekstrom, on behalf of the defendant corporation signed said check and thereby caused a withdrawal of said funds he acted for said corporation, and said corporation was chargeable with what knowledge the defendant Ekstrom then possessed.

"(7) Eric S. Ekstrom, having personally signed said check and thereby caused a withdrawal of said funds, and said act being for the benefit of the defendant corporation, both said defendant corporation and said Eric S. Ekstrom became liable in a court of equity to return to the Receiver of said Bank, the funds so withdrawn.

"(8) The directors of the bank knew its condition to be as found above and placed its officers in position to pay the check in question, drawn by one possessing knowledge of the bank's condition which he acquired because he held a confidential position in the bank and thereby learned facts not known to depositors generally. The payment of the check in fact created a preference and it must be held in law the parties intended the result of their acts.

"(9) The funds of the Mechanics Universal Joint Company were not transferred from its checking account in the Manufacturers National Bank and Trust Company in the usual and ordinary course of business.

"(10) The Mechanics Universal Joint Company, through its president, Eric S. Ekstrom, who was also a director of the Manufacturers National Bank and Trust Company, knew at the time the several deposits were made by it in the Manufacturers National Bank and Trust Company, that the Manufacturers National Bank and Trust Company was in a precarious and embarrassing financial condition and hence the depositor was not an innocent depositor and no fraud was practised upon such depositor. The counter-claim cannot be sustained."

the check was paid, and (4) none of the officers, at the time the check was paid, contemplated an act of insolvency, or the closing of the bank. The court found that fact (1) was true, but, even so, that fact of itself would not invalidate the decree. The court also found that the bank was insolvent on Sunday, June 14, and that there had been no appreciable change in its condition since June 12, the day of the directors' meeting. That finding we think was supported by material evidence and we can not disturb it. It may be true that none of the officers thought it was insolvent, or contemplated an act of insolvency or the closing of the bank, but in view of the condition disclosed, and the reports and correspondence from the Comptroller, together with the advice and suggestions of the examiner, we are convinced that the officers and directors should have known that the bank was insolvent and that closing was imminent. We think the court's findings and conclusions, in so far as they bear on this question, were amply supported by the evidence.

But the bill did not wholly rely upon section 91 for a recovery. It also pleaded a charge of common law negligence. That this is a proper practice can not be doubted. *Bowerman* v. *Hamner,* 250 U. S. 504.

It is contended, however, by appellants that the evidence conclusively shows that the check was drawn and signed before the bank directors' meeting on June 12; that Ekstrom did not order the check drawn nor divulge to the Mechanics Company or its agents any information received by him at the directors' meeting; and that neither the drawing of the check nor the money was caused by any information received from Ekstrom. Without conceding it, we shall treat the language of these contentions as tantamount to saying there was no substantial evidence to support the court's findings in these respects. It would serve no good purpose to set forth the evidence in detail. A perusal of the entire record convinces us that with respect to both appellants, the court's findings are supported by direct material evidence as well as by logical and legitimate inferences. It is further contended, however, that the court will not indulge in the presumption that Ekstrom divulged to others any information received from the bank directors' meeting. That may be conceded, but the court's findings and conclusions are not based on that presumption. That Ekstrom signed the check as president of the company after he left the bank directors' meeting is supported by material evidence, and he neither affirmed nor de-

nied it. He was an officer and agent of the Mechanics Company, as well as a director of the bank, hence it was not necessary for him to divulge any information to accomplish the withdrawal of the funds. He, whose signature gave vitality to the check, already had the information when he signed it. That act was his company's act, and his information at that time was his company's information. These circumstances, we think, constitute a sufficient basis for the court's conclusions Nos. 4, 5, 6 and 7, 8, and 9.

We are further of the opinion that the court was warranted in dismissing the appellant company's counter-claim on the theory that no fraud was practiced upon it by the bank and that it was not an innocent depositor by reason of the acts of its president.

Error is assigned upon the court's admission of four exhibits offered by appellee. Two of these were copies of the bank examiner's reports on the respective dates of December 1, 1930, and May 29, 1931; one was a letter from the Comptroller to the bank, bearing date of February 24, 1931; and the other was a letter from the Comptroller to the bank, bearing date of May 29, 1931. We find no error in the admission of any of these exhibits.

Decree

AFFIRMED.

Endorsed: Filed November 15, 1935. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fifteenth day of November, 1935, the following further proceedings were had and entered of record, to-wit:

Friday, November 15, 1935.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Charles G. Briggle, District Judge.

Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom,
5384 *vs.*
A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, Successor to L. B. Achor, former Receiver, and all others similarly situated.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Western Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the Decree of the said District Court in this cause be, and the same is hereby affirmed with costs and interest from the date of the Decree of the said District Court until paid, at the same rate that similar decrees bear in the courts of the State of Illinois.

And afterwards, to wit: On the fourth day of December, 1935, there was filed in the office of the clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the thirty-first day of December, 1935, the following further proceedings were had and entered of record, to-wit:

Tuesday, December 31, 1935.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Samuel G. Briggle, District Judge.

Mechanics Universal Joint Company, *et al.*,
5384 *vs.*
A. B. Culhane, Receiver, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

It is ordered by the court that the Petition for a Rehearing in this cause be, and the same is hereby denied.

And afterwards, to-wit: On the sixth day of January, 1936, the following further proceedings were had and entered of record, to-wit:

Monday, January 6, 1936.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.

Mechanics Universal Joint Company, *et al.*,
5384 *vs.*
A. B. Culhane, Receiver, etc.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

Now this day comes counsel for appellant and presents a motion for a stay of Mandate of this court, pending a petition to the Supreme Court of the United States for a writ of certiorari.

On Consideration Whereof: It is now here ordered that the Mandate in this cause be, and the same is hereby stayed until the further order of this court.

It is further ordered that counsel for appellant proceed with diligence and promptly file the petition for a writ of certiorari in the Supreme Court of the United States, and forthwith file in this court proof of the filing of said petition in said court.

And afterwards, to-wit: On the twenty-fourth day of January, 1936, there was filed in the office of the Clerk of this court, a Praecipe for Record and Stipulation appended thereto, which said Praecipe is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1935.

No. 5384.

Mechanics Universal Joint Company, a Corporation, and Eric S. Ekstrom,

Appellants,

vs.

A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. Achor, former Receiver, and all others similarly situated,

Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.
Honorable
Charles E. Woodward,
Judge Presiding.

To the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit:

The Clerk will please prepare a transcript on Application for Certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The printed record in the Court of Appeals.

2. Minute entry showing argument of cause.
3. The opinion of the Circuit Court of Appeals affirming the District Court.
4. Decree of Affirmance.
5. Order denying petition for Rehearing and directing mandate to issue.
6. Order Suspending issuance of mandate.
7. Certified copy of Second Amended Counterclaim and Reply to Second Amended Counterclaim.
8. Praecipe and Stipulation appended thereto.

Respectfully,

MECHANICS UNIVERSAL JOINT COMPANY,
Appellant,
By G. A. SHALLBERG,
G. A. Shallberg
S. R. KENWORTHY,
S. R. Kenworthy
Its Attorneys.

and ERIC S. EKSTROM, *Appellant,*
By SHELBY L. LARGE,
Shelby L. Large
His Attorney.

Service accepted and acknowledged this 9th day of January, A. D. 1936.

ROY F. HALL,
Attorney for Appellee.

It is stipulated and agreed by Counsel for the respective parties that in printing the Record to be sent the Supreme Court of the United States, only so much of the original exhibits sent up to the U. S. Circuit Court of Appeals, 7th Circuit, from the U. S. District Court for the Northern District, Western Division, shall be printed as follows—Of Plaintiffs' Exhibit 22, the letter of the Comptroller of the Currency dated Jan. 8, 1931; page one which is entitled "Examiners report of the Condition of the Manufacturers Bank and Trust Co., Rockford, Winnebago County, Illinois; that part of page 11, including and all underneath the words "Recapitulation—Losses, etc." All of Plaintiffs' Exhibit 24; so much of Plaintiffs' Exhibit 25 as follows:—page one entitled "Examiners Report of the Condition of the Manufacturers Nat'l. Bank and Trust Co., Rockford, Winnebago County,

Illinois." Also all of page eleven which includes the words "Recapitulation—Losses, etc." and all underneath the same.

S. R. KENWORTHY,
Atty. for Mechanics Universal Joint Co.

SHELBY L. LARGE,
Atty. for Eric Ekstrom.

ROY F. HALL,
Attorney for A. B. Culhane, Receiver.

Endorsed: Filed January 24, 1936. Frederick G. Campbell, Clerk.

PLAINTIFF'S EXHIBIT 22.

TREASURY DEPARTMENT

Washington

January 8, 1931.

Comptroller of the Currency

Address Reply to
"Comptroller of the Currency"
Board of Directors,
Manufacturers National Bank & Trust Co.,
Rockford, Illinois.

Gentlemen:

While the report of an examination of your bank completed December 4, a copy of which was furnished you, shows a continued unsatisfactory condition, the Chief Examiner advised under date of January 3, 1931, that President Floberg informed him that the following losses and undesirable assets were eliminated through an affiliated company as stated below:

Loss Items	$160,877.12
Doubtful Items	237,042.84
Total	$397,919.96

Settlement for these items were as follows:

Cash	98,000.00
Note—Winnebago Securities Corp., one year	50,000.00
Note—Winnebago Securities Corp, two years	125,000.00
Note—Winnebago Securities Corp., three years	124,919.96
Total	$397,919.96

It is, of course, understood that the notes of the Corporation are interest bearing obligations and that they are secured by the assets removed.

The removal of the assets referred to is commendable and materially improves the bank's condition. However, there is still much to be done in order to place the assets in satisfactory condition and it is urged that all criticised assets receive your most constant and vigorous attention with a view to collections, reductions or other satisfactory adjustments. In this connection the Chief Examiner advises that it was agreed to obtain the services of a competent executive vice president to assist in correcting objectionable matters and improving the loans, also that the payment of dividends would be discontinued for the present. Special attention should be given to the liquidation of the assets securing the notes of the Winnebago Securities Corp.

It is noted that, although a substantial reduction has been effected in the obligation of the Rolling Green Real Estate Subdivision since the time of the previous examination, it is still greatly in excess of the legal loan limit of your bank. This line, which involves Directors Floberg, Olson and Esktrom, should be brought within lawful requirements without further delay.

Please review the report of examination in conjunction with this letter at the time of your board meetings in February and March and immediately after each meeting advise this office the progress made in collecting, reducing or otherwise satisfactorily adjusting the slow and doubtful loans, giving names and amounts; whether the excessive loan mentioned above has been reduced to the legal limit; and state the reductions effected in the large lines of credit and obligations of the various directors, also giving the names and amounts, furnishing a copy of your communications to Chief Examiner

A. P. Leyburn, 164 W. Jackson Boulevard, Room 1209, Chicago, Illinois.

Very truly yours,
JOHN L. PROCTOR,
John L. Proctor,
Deputy Comptroller.

Examiner's Report of the Condition of

The Manufacturers National Bank & Trust Company, (City) Rockford, (County) Winnebago, (State) Illinois Examination commenced at 3 o'clock P. M., on December 1, 1930 Examination closed at 3 o'clock P. M., on December 4, 1930.

Form 1425
TREASURY DEPARTMENT
Comptroller of the Currency—Examining

Examiner	34 hrs.
Assistants	100 hrs.

State whether special or regular examination Special

A copy of this report of examination is furnished to the Board of Directors of the examined bank for their information and consideration. The information contained therein is based upon the records and books of the bank and upon statements made to the Examiner by officers and employees of the bank, and on data secured from other sources believed to be reliable, and presumed by the Examiner to be correct.

Much of the information in regard to the assets of the bank is of such a character as to make it necessary for the Examiner to rely upon the good faith and assurances of his informants, and while the Examiner regards the statements so accepted by him as correct, he is, necessarily, not in a position to guarantee the accuracy of such part of the information as may not have been obtained at first hand.

Name of Examiner, H. S. French No. of Bank, 3952
Fed. Res. Dist. No., 7
A. R. Floberg, President. H. A. Conklin, Cashier.

Resources	Amount
1. Loans and Discounts,	2,852,195.09
2. Overdrafts,	1,209.62
3. Interest earned not collected,	

4.	Customers' liability account of "Acceptances,"		
5.	U. S. Bonds to secure circulation,		200,000.00
6.	U. S. Bonds and certificates pledged,		297,960.00
7.	U. S. Bonds and certificates not pledged,		116.87
8.	Premium on U. S. Bonds,		4,224.11
9.	Bonds, Securities, etc. (pledged and unpledged),		633,448.79
10.	Federal Reserve Bank Stock,		21,000.00
11.	Banking House,	544,410.50	
	Furniture and fixtures,	60,775.74	605,186.24
12.	Other Real Estate Owned,		21,660.01
13.	Due from Federal Reserve Bank,		157,144.35
14.	Due from Federal Reserve Bank Transit Account,		61,716.98
15.	Due from Trust Companies, Banks, and Bankers,		134,776.19
16.	Exchanges for Clearing House,		60,954.91
17.	Checks on other Banks in same place,		
18.	Cash,		61,155.38
19.	Cash Items,		7,394.18
20.	Cash Short,		
21.	5% Red'n Fund with Treas. U. S.,		10,000.00
22.	Other Funds with Treasurer U. S.,		
23.	Other Assets (describe),		
	A. Coupons for collection		12,928.02
	Total,		5,143,071.24

	Liabilities		Amount
1.	Capital Stock Paid in,		500,000.00
2.	Surplus Fund,		200,000.00
3.	All other Undivided Profits,	98,463.13	
	Less expenses, etc.	36,770.86	61,692.27
4.	Reserves for Dividends, Contingencies, etc.,		11,000.00
5.	Reserves for Interest, Taxes, and other expenses accrued and unpaid,		13,411.79
6.	Interest collected, not earned,		
7.	Due to Federal Reserve Bank,		
8.	Due to Trust Companies, Banks, and Bankers,		4,879.80
9.	Certified Checks,		3,127.35
10.	Cashier's Checks Outstanding,		9,897.49
11.	Dividends Unpaid,		644.27

12.	Demand Deposits:		
	Ind. Dep. subject to check, (Including those subject to notice of less than 30 days.)	1,440,623.01	
	Cts. of Dep. due in 30 days or less,	257,487.38	1,698,110.39
13.	Time Deposits:		
	A. Savings Deposits (due after, or subject to notice of, 30 or more days),	2,357,353.58	
	1. Evidenced by pass book,		
	2. Evidenced by Certificates of Deposits,		
	B. Other Deposits subject to 30 or more days' notice,	56,152.47	
	C. Postal Savings,	26,801.83	2,440,307.88
14.	United States Deposits, (Including U. S. Disbursing Officers.)		
15.	Circulation rec'd, Less on hand and returned.	200,000.00	200,000.00
16.	Bonds Borrowed,		
17.	Bills Payable with Federal Reserve Bank,		
18.	Other Bills Payable,		
19.	Notes and Bills Rediscounted with Federal Reserve Bank,		
20.	Other Notes and Bills rediscounted,		
21.	Bills of exchange or Drafts indorsed, guaranteed by this bank, and not otherwise shown,		
22.	Accepted Bills of exchange payable abroad,		
23.	Cash Letters of Credit and Travelers' Checks Outstanding,		
24.	Acceptances Executed to Furnish Dollar Exchange,		
25.	Acceptances Executed for Customers,		
26.	Time Drafts Issued,		
27.	Cash Over,		
28.	Other Liabilities (describe),		
	Total,		5,143,071.24

Contingent Liabilities

Unused letters of credit outstanding, $.....

Future contracts to buy and sell exchange, $.....

12/11/30

Recapitulation—Losses, Etc.

Resources	Slow	Doubtful (loss probable, but not estimated)	Estimated losses
All loans and discounts,	1,014,167.09	228,173.34	138,789.96
Overdrafts,			
Premium on U. S. Bonds,	275.00	76,800.00	
Bonds, securities, etc.,)			
Banking house,)			
Furniture and fixtures,)		150,000.00	
Other real estate,	21,660.01		
Cash Items,			
Shortages,			
Judgments,			22,037.16
Unpaid Bills,			
Est. Deprec. Bd. a/c		5,132.30	2,000.00
Total,	1,036,102.10	462,105.64	162,877.12

Surplus, Undivided Profits, Etc.

Surplus fund,	$200,000.00
Net undivided profits,	61,692.27
All reserve accounts,	24,411.79
Total,	$286,104.06

Were estimated losses charged off during examination? To be eliminated through sale or charge off.

List items requiring attention and note any corrections made or promised during examination.

Criticised Assets.

48% of Bills Receivable subject to criticism. Further heavy losses inevitable.

Directors Borrowing.

Still borrowing for themselves and their companies in excess of bank's invested capital.

Excess Loan.

H. S. FRENCH,
Examiner.
By ALFRED P. LEYBURN,
Chief Examiner.

I certify on honor that all of the schedules on this report of examination have been carefully added, and the reserve computed and found correct as stated on page 2.

EMMA L. CHRISTENSEN,
Chief Clerk.

S'B

To the Comptroller of the Currency,
Washington, D. C.

PLAINTIFF'S EXHIBIT 24.

TREASURY DEPARTMENT

Washington

May 28, 1931.

Comptroller of the Currency

Address Reply to
"Comptroller of the Currency"
Board of Directors,
Manufacturers National Bank & Trust Co.,
Rockford, Illinois.

Gentlemen:

The report of examination of your bank completed May 1, copy of which was furnished you, has been received.

While it is believed you are cognizant of the extremely unsatisfactory condition of the assets and are trying to work the bank out of its present dangerous situation, conditions are such that little or no progress can be made and the bank is faced with potential losses that threaten its solvency. If you and the active management can be more vigorous in your efforts to liquidate or adjust with adequate security the criticised assets, it is urged that you do so, as only through a successful liquidating and securing program will the desired results be obtained. In connection with the obligation of the Winnebago Securities Corporation, $297,919.96, representing the balance due on the purchase price of $397,919.96 of losses and doubtful assets, $100,000 having been paid in cash, it is observed that $150,000 thereof is classed doubtful. Even though the shareholders contributed $100,000 to capitalize the company and to make the initial cash payment, the mere changing of the form of losses and doubtful assets to notes

of the company with no intention of liquidating them except through salvage from the eliminated assets, which the examiner states will not be very large, is not a satisfactory manner in which to rehabilitate the bank and if the notes of the company are not paid promptly when due it will be necessary for the examiner to estimate losses on the entire obligation, which would have to be charged off or provided for through an assessment against the stock.

It is observed that losses of $19,795.50 are to be charged off or sold to the securities company prior to June 15. In view of the classification of the company's present obligation, it is in no condition to purchase any further worthless assets and the losses should be promptly charged off against the profits of the bank. Any available cash in possession of the Winnebago Securities Company should be used to liquidate its present indebtedness to the bank.

Please also note the heavy borrowings of certain of the directors and their concerns, approximately 31% of the total loans and discounts, and to the examiner's statement that some of their lines are the weakest in the bank and heavy losses appear inevitable. This is a condition which should not exist and in fairness to the bank all criticised lines of directors and their concerns should be given immediate attention with a view to collection, substantial reductions or placing in such condition that they are not subject to criticism. Definite results in this regard will be expected.

Please review the report of examination and this letter at each monthly board meeting and advise this office, over the individual signatures of the available directors, the progress being made in collecting, reducing and adjusting the past due paper and slow and doubtful assets, giving names and amounts, and the reduction effected in the borrowings of the directors and their concerns, stating in your first report what reduction has been obtained in the bank's liability for money borrowed and whether the losses of $19,795.50 have been charged off, forwarding copies of your communications to Chief Examiner A. P. Leyburn, 164 West Jackson Boulevard, Room 1209, Chicago, Ill. and Examiner M. R. Baty, P. O. Box 527, Rock Island, Illinois.

Very truly yours,

JOHN L. PROCTOR,
John L. Proctor,
Deputy Comptroller.

PLAINTIFF'S EXHIBIT 25.

Examiner's Report of the Condition of

The Manufacturers National Bank & Trust Co.,
(City) Rockford, (County) Winnebago, (State) Illinois
Examination commenced at 3:10 o'clock P. M., on April 27, 1931. Examination closed at 5:30 o'clock P. M., on May 1, 1931 (Two days intervening)

Form 1425

TREASURY DEPARTMENT

Comptroller of the Currency—Examining

Examiner's	Hrs—30
Assistants'	" —90

State whether special or regular examination Regular

A copy of this report of examination is furnished to the Board of Directors of the examined bank for their information and consideration. The information contained therein is based upon the records and books of the bank and upon statements made to the Examiner by officers and employees of the bank, and on data secured from other sources believed to be reliable, and presumed by the Examiner to be correct.

Much of the information in regard to the assets of the bank is of such a character as to make it necessary for the Examiner to rely upon the good faith and assurances of his informants, and while the Examiner regards the statements so accepted by him as correct, he is, necessarily, not in a position to guarantee the accuracy of such part of the information as may not have been obtained at first hand.

Name of Examiner, M. R. Baty No. of Bank, 3952
Fed. Res. Dist. No., 7

A. R. Floberg, President. H. A. Conklin, Cashier.

Resources	Amount
1. Loans and Discounts,	2,503,335.73
2. Overdrafts,	1,534.30
3. Interest earned not collected,	
4. Customers' liability account of "Acceptances,"	
5. U. S. Bonds to secure circulation,	200,000.00
6. U. S. Bonds and certificates pledged,	334,960.00
7. U. S. Bonds and certificates not pledged,	1,684.84
8. Premium on U. S. Bonds,	5,117.50
9. Bonds, Securities, etc. (pledged and unpledged),	419,338.87

10.	Federal Reserve Bank Stock,		21,000.00
11.	Banking House,	538,000.00	
	Furniture and fixtures.	54,197.21	592,197.21
12.	Other Real Estate Owned,		21,660.01
13.	Due from Federal Reserve Bank,		150,162.06
14.	Due from Federal Reserve Bank Transit Account,		15,948.16
15.	Due from Trust Companies, Banks, and Bankers,		132,939.30
16.	Exchanges for Clearing House,		30,450.10
17.	Checks on other Banks in same place,		
18.	Cash,		96,454.13
19.	Cash Items,		1,412.72
20.	Cash Short,		131.64
21.	5% Red'n Fund with Treas. U. S.,		10,000.00
22.	Other Funds with Treasurer U. S.,		
23.	Other Assets (describe),		
	Coupons for collection		7,530.25
	Total,		4,545,856.82

	Liabilities		Amount
1.	Capital Stock Paid in,		500,000.00
2.	Surplus Fund,		200,000.00
3.	All other Undivided Profits,	88,334.46	
	Less expenses, etc.	10,236.02	78,098.44
4.	Reserves for Dividends, Contingencies, etc.,		3,000.00
5.	Reserves for Interest, Taxes, and other expenses accrued and unpaid,		10,162.50
6.	Interest collected, not earned,		
7.	Due to Federal Reserve Bank,		
8.	Due to Trust Companies, Banks, and Bankers,		2,283.71
9.	Certified Checks,		1,779.63
10.	Cashier's Checks Outstanding,		19,670.19
11.	Dividends Unpaid,		393.02
12.	Demand Deposits:		
	Ind. Dep. subject to check, (Including those subject to notice of less than 30 days.)	1,089,852.35	
	Ctfs. of Dep. due in 30 days or less,	236,713.32	1,326,565.67

13.	Time Deposits:		
	A. Savings Deposits (due after, or subject to notice of, 30 or more days),	1,976,142.18	
	1. Evidenced by pass book,		
	2. Evidenced by Certificates of Deposits,		
	B. Other Deposits subject to 30 or more days' notice,	39,027.39	2,015,169.57
	C. Postal Savings,		
14.	United States Deposits, (Including U. S. Disbursing Officers.)		
15.	Circulation rec'd, Less on hand and returned.	200,000.00	200,000.00
16.	Bonds Borrowed,		
17.	Bills Payable with Federal Reserve Bank,		
18.	Other Bills Payable,		
19.	Notes and Bills Rediscounted with Federal Reserve Bank,		188,734.09
20.	Other Notes and Bills rediscounted,		
21.	Bills of exchange or Drafts indorsed, guaranteed by this bank, and not otherwise shown,		
22.	Accepted Bills of exchange payable abroad,		
23.	Cash Letters of Credit and Travelers' Checks Outstanding,		
24.	Acceptances Executed to Furnish Dollar Exchange,		
25.	Acceptances Executed for Customers,		
26.	Time Drafts Issued,		
27.	Cash Over,		
28.	Other Liabilities (describe),		
	Total,		4,545,856.82

Contingent Liabilities

Unused letters of credit outstanding, $.....

Future contracts to buy and sell exchange, $.....

5-11-31

Recapitulation—Losses, Etc.

Resources		Slow	Doubtful (loss probable, but not estimated)	Estimated losses
All loans and discounts,		1,112,241.14	226,765.38	
Overdrafts,				
Premium on U. S. Bonds,				11,500.00
Bonds, securities, etc.,				
Deprec.			24,055.96	8,000.00
Banking house,)				
Furniture and fixtures,)			150,000.00	
Other real estate,		21,660.01		
Cash Items,				
Shortages,				
Judgments & Claims,		11,300.00	30,000.00	
Unpaid Bills,				
Transit Items				295.50
Check 8-25-30	52.00			
Interstate Coal Co.	240.00			
Realty Sureties	3.50			
Total,		1,145,201.15	430,821.34	19,795.50

Surplus, Undivided Profits, Etc.

Surplus fund,	$200,000.00
Net undivided profits,	78,098.44
All reserve accounts	13,162.50
Total,	$291,260.94

Were estimated losses charged off during examination? To be charged off or sold to Securities Co. prior to June 15.

List items requiring attention and note any correction made or promised during examination.

Loans & Discounts: Over 50% of all loans subject to criticism. Heavy losses in prospect.

Directors' Borrowings: Still in excess of invested capital. Their lines contain some of the weakest in the bank. Heavy losses in these lines inevitable.

Deposit Shrinkage: Deposits are down over $800 since last

examination: This will seriously curtail earnings for current year.

M. R. BATY,
Examiner.

By ALFRED P. LEYBURN,
Chief Examiner.

I certify on nonor that all of the schedules on this report of examination have been carefully added, and the reserve computed and found correct as stated on page 8.

EMMA L. CHRISTENSEN,
Chief Clerk.

HS
To the Comptroller of the Currency,
Washington, D. C.

And afterwards, to wit: On the fourteenth day of February, 1936, there was filed in the office of the Clerk of this Court a Motion for Substitution of Party Appellant and Consent to Entry of Order of Substitution, which said Motion for Substitution and Consent are in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5384

Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom,
Appellants,
vs.
A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. Achor, former Receiver, and all others similarly situated,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

Honorable Charles E. Woodward, Judge, Presiding.

MOTION FOR SUBSTITUTION OF PARTY.

Now Comes Grace M. Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, deceased, and moves the Court that said Grace M. Ekstrom as Administratrix of the estate of Eric S. Ekstrom, Deceased, be substituted as a party in the foregoing proceeding in the place of Eric S. Ekstrom.

In Support of said motion there is attached hereto a copy of the Letters of Administration issued by the Clerk of the Probate Court of Winnebago County, Illinois, to Grace M. Ekstrom dated January 20, 1936 and duly certified by Charles F. Brown, Clerk of the Probate Court of Winnebago County under the seal of the Probate Court of said County. There is also attached hereto an affidavit of Shelby L. Large to the effect that Eric S. Ekstrom departed this life intestate on or about January 12, 1936.

Dated February 10th, 1936.

Respectfully submitted,
GRACE M. EKSTROM,
By SHELBY L. LARGE,
Her Attorney.

Letters of Administration.

State of Illinois } ss.
Winnebago County }

The People of the State of Illinois to all to whom these presents shall come, Greetings:

Know Ye, Whereas, Eric S. Ekstrom of the County of Winnebago and State of Illinois, died intestate, as it is said, on or about the 12th day of January, A. D. 1936, having at the time of his decease personal property which may be lost, destroyed or diminished in value, if speedy care be not taken of the same.

To the End, Therefore, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Grace M. Ekstrom of the County of Winnebago and State of Illinois, administratrix of all and singular the goods and chattels, rights and credits, which were of the said Eric S. Ekstrom at the time of his decease; with full power and authority to secure and collect the said property and debts, wheresoever the same may be found, and in general to do and perform all other acts which now are, or hereafter may be required of her by law.

Witness, Charles F. Brown, Clerk of the Probate Court, in and for the said County of Winnebago at his office in Rockford, this 20th day of January, A. D. 1936, and the Seal of said Court hereunto affixed.

CHARLES F. BROWN,
Clerk of the Probate Court.

(Seal)

By.....
Deputy.

State of Illinois, } ss.
County of Winnebago }

I, Charles F. Brown, Clerk of the Probate Court of Winnebago County (the same being a Court of Record, and having a seal and having a common Law jurisdiction in all probate matters) do hereby certify that I have compared the foregoing copy of the Record Letters of Administration in the Matter of the Estate of Eric S. Ekstrom, Deceased, with the Original Record thereof now remaining in my office, and have

found the same to be a correct transcript therefrom and of the whole of such Original Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at the City of Rockford, in said County this 6th day of February, A. D. 1936.

CHARLES F. BROWN,
(Seal) *Clerk.*

State of Illinois, }
Winnebago County, } ss.

SHELBY L. LARGE, being duly sworn, on oath states:

That he is an attorney at law and has heretofore appeared on behalf of Eric S. Ekstrom, one of the defendants named in a certain proceeding in equity Number 5384, entitled, "Mechanics Universal Joint Co., a corporation, and Eric S. Ekstrom as appellants, and A. B. Culhane, receiver, *et al.* as Appellee in an appeal from the District Court of the United States for the Northern District of Illinois, before the United States Circuit Court of Appeals for the Seventh Circuit; that he was well acquainted with Eric S. Ekstrom during his lifetime and that said Eric S. Ekstrom died intestate at Rockford, Illinois on January 12, 1936;

That later, on the 20th day of January, 1936, Grace M. Ekstrom was appointed by an order of the Probate Court of Winnebago County, Illinois, Administratrix of the said Estate of Eric S. Ekstrom, Deceased, and that proceedings in said estate are now pending in the Winnebago County Probate Court; that the said Grace M. Ekstrom has duly qualified as Administratrix of said Estate by giving a bond as required by the said Probate Court and is now acting as such Administratrix under the orders of the Probate Court of Winnebago County, Illinois.

SHELBY L. LARGE.

Subscribed and sworn to before me this 10 day of February, A. D., 1936.

HAZEL W. LUSTED,
(Seal) *Notary Public, Winnebago County, Illinois.*

Endorsed: Filed Feb. 14, 1936. Frederick G. Campbell, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 5384

Mechanics Universal Joint Company, a corporation, and Eric S. Ekstrom,
Appellants,
vs.
A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. Achor, formerly Receiver, and all others similarly situated,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

Honorable
Charles E. Woodward,
Judge, Presiding.

CONSENT TO ENTRY OF AN ORDER SUBSTITUTING PARTIES.

Now Comes A. B. Culhane, as Receiver of the Manufacturers National Bank & Trust Company, of Rockford, Illinois, successor to L. B. Achor, formerly Receiver, by Roy F. Hall, his attorney, and consents that an order be entered by the Court, substituting Grace M. Ekstrom as Administratrix of the estate of Eric S. Ekstrom, Deceased, as a party in the foregoing proceeding in place of Eric S. Ekstrom, and that the said order may be entered without any other or further notice to the undersigned.

Dated at Rockford, Illinois, this 12th day of February, A. D., 1936.

A. B. CULHANE,
Receiver of the Manufacturers National Bank & Trust Company of Rockford, Illinois, successor to L. B. Achor, Formerly Receiver.
By ROY F. HALL,
His Attorney.

Endorsed: Filed Feb. 14, 1936. Frederick G. Campbell, Clerk.

Friday, February 14, 1936.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

(Caption—No. 5384)

On motion of Grace M. Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, Deceased, for substitution as party appellant in the place of Eric S. Ekstrom, supported by a certified copy of Letters of Administration of said Estate and by the affidavit of Shelby L. Large,

It is now here ordered that Grace M. Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, Deceased, be, and she is hereby substituted as party appellant in this cause in the place of Eric S. Ekstrom, Deceased.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term, A. D. 1935.

No. 5384

Mechanics Universal Joint Company, a Corporation, and Eric S. Ekstrom, *Appellants,*

vs.

A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, successor to L. B. Achor, former Receiver, and all others similarly situated, *Appellee.*

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division.

Honorable Charles E. Woodward, Judge Presiding.

To the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit:

The Clerk will please prepare as an addition to the transcript on Application for Certiorari to the Supreme Court of the United States in the above entitled cause, the follow-

ing, which are in addition to the items mentioned in the praecipe heretofore filed herein:

1. Motion to substitute Grace M. Ekstrom Administratrix as Appellant in place of Eric S. Ekstrom, deceased.

2. Consent of Appellee for the substitution of parties in the above entitled cause.

3. Order granting the above entitled motion to substitute Grace M. Ekstrom Administratrix as Appellant in the place of Eric S. Ekstrom, deceased.

Respectfully,

MECHANICS UNIVERSAL JOINT COMPANY,
Appellant,
By G. A. SHALLBERG
G. A. Shallberg
S. R. KENWORTHY
S. R. Kenworthy
Its Attorneys.
and GRACE M. EKSTROM,
Appellant,
By SHELBY L. LARGE
Shelby L. Large
Her Attorney.

Endorsed: Filed Feb. 21, 1936. Frederick G. Campbell, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 221 to 260, inclusive, contain a true copy of the proceedings had and papers filed, made in accordance with the Praecipe filed on January 24, 1936 and the stipulation appended thereto (excepting Item 1 of said Praecipe, being the printed record) which said record is certified herewith under a separate certificate, and with the supplemental praecipe filed on February 21, 1936, in the case of

Mechanics Universal Joint Company, a corporation, and Grace M. Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, Deceased,

Appellants,

vs.

A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, Successor to L. B. Achor, Former Receiver, and all others similarly situated,

Appellee,

No. 5384, October Term, 1935, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 26th day of February, A. D. 1936.

(Seal)

FREDERICK J. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

5384

MECHANICS UNIVERSAL JOINT COMPANY

vs.

A. B. CULHANE, Receiver

Appeal from the District Court of the United States for the Northern District of Illinois, Western Division

I hereby certify that in the transcript of the record, prepared for the Supreme Court in the above entitled cause, in the last line on page 253 appears the figures $800. A close examination of the original, from which this is printed, reads "$800M", and the said certified record and copies of same should be corrected accordingly.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 13th day of April, A. D. 1936.

Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal United States Circuit Court of Appeals, Seventh Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 27, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILED
MAR 24 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. [redacted] 17

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

S. R. KENWORTHY,
Moline, Illinois,
Solicitor for Mechanics Universal Joint Company.

SHELBY L. LARGE,
Rockford, Illinois,
Solicitor for Grace Ekstrom, Administratrix of Eric S. Ekstrom, Deceased.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. HEARD IN THAT COURT ON APPEAL FROM UNITED STATES DISTRICT COURT FOR NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION (HONORABLE CHAS. E. WOODWARD, JUDGE).

PETITION FOR WRIT OF CERTIORARI.

The petitioners, Mechanics Universal Joint Company, a corporation, and Grace Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, Deceased, pray that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Seventh Circuit, entered in the above cause on November 15, 1935 (Record 238) (80 Fed. (2) 147),

which decree affirmed, with costs and interest, the decree of the District Court for the Northern District of Illinois, Western Division (Record 195-6). A petition for rehearing was filed with the Circuit Court of Appeals on the 4th day of December, A. D. 1935 (Record 238), which was denied on December 31, 1935 (Record 239). The Defendant Eric S. Ekstrom departed this life intestate on January 12, 1936 and by Order of the Circuit Court of Appeals, Grace M. Ekstrom, Administratrix of the Estate of Eric S. Ekstrom, was substituted as a party Appellant in this cause in place of Eric S. Ekstrom (Record 259).

Decree Below.

The decree below was a money decree dated July 14, 1934 ordering that Respondent have and recover from Defendants Mechanics Universal Joint Company and Eric S. Ekstrom, the sum of $25,216.45; that each of said Defendants are ordered and directed by the Court, within twenty (20) days of this date, to return to the possession of A. B. Culhane, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, the said sum of $25,216.45, with interest to date of payment; that execution may issue; that Defendants pay costs, and that execution of decree be stayed until August 20, 1934 (Record 195).

Questions Presented.

A withdrawal of a portion of a deposit in a National Bank (Manufacturers National Bank), by a corporation depositor (Mechanics Universal Joint Company), was made on Saturday, June 13, 1931, the last day the Bank was open for business, but at a time when the Bank was open for business and on a day when the Bank was able to, and did, meet all demands made upon it, when, at the time the withdrawal was effected, and during the whole of that banking

day it had committed no act of insolvency. On Friday, June 12, 1931, the day before the withdrawal, a Bank Examiner from the Comptroller's Office had addressed an informal meeting of the Bank's Directors, (of which Board of Directors of the Bank the Corporation depositor's President was a member and was present), and had advised the Directors that *another* Bank (Security National Bank) in the City was in trouble and that he (the Examiner) was endeavoring to effect a consolidation of that other Bank with still another Bank in the City; that whether the consolidation could be effected or not would be known definitely the following Monday, and that in his opinion whether the merger were effected or not, the result would be that a condition of uneasiness would result on the following Monday, which would, in his opinion, cause a run on every Bank in the City, and in his judgment the cash reserves of the Bank, whose Directors he was addressing, could not stand a protracted run, and he requested the Board to authorize him to negotiate with some other Bank for a merger or take-over of some kind, which authority the Board of Directors gave. Following the meeting, (held at noon on Friday) the President of the corporation depositor, joined with its Secretary-Treasurer, signed, as President and Secretary-Treasurer, respectively, of the depositor, a check drawn by the depositor on said Bank for $42,716.12, payable to itself, and duly endorsed to the Third National Bank of Rockford, which check was sent by mail to the last named Bank, which received the check and presented it for payment to the Clearing House on Saturday morning, June 13th, where it was paid by the Manufacturers Bank, and the result was, that the amount represented by the check was transferred to the account of the depositor in the Third National Bank. It also appears from the evidence, objected to by Defendant, that the Bank had been examined by the agent of the Comptroller in December

and April previous to the withdrawal (June 12) and that the President of the depositor, in his capacity as Director of said Bank, had been notified by the Comptroller, in writing, about January 13 and May 28 that some of the Bank's assets were doubtful, some desperate; that the Bank had suffered some losses and heavy withdrawals and demanding that the Bank take immediate steps to liquidate or further secure the criticized assets (see excerpts from Comptroller's letters in Court's finding 13, Record 189-190) (See also Exhibits 22, 24 and 25, Record 242-254).

There is no proof in the Record either (1) that the Manufacturers Bank had committed any act of insolvency at the time the check in question was paid, nor (2) is there any proof that the Bank, or its Officers, at the time of paying the check, contemplated any act of insolvency, or was faced with the maturity of any obligation it was unable to meet, unless it can be said that the *opinion* of the Bank Examiner that the condition of the Security Bank was such as, *in his opinion,* would cause uneasiness among all depositors in the City which would cause runs upon every Bank in the City, and that the run upon the Manufacturers Bank would be so protracted that it could not meet the same, is conclusive proof of the fact that the Bank was facing a situation such as would amount to a contemplation, by its Officers, of an act of insolvency; and there is in the Record no proof of any kind that the paying Officers of the Bank paid the check in question with any intent to prefer the depositor over any other creditor of the Bank, or with a purpose to prevent the application of the Bank's assets as provided by the National Banking Act, and the proof is that the check was paid as a part of the ordinary and usual business of the Bank.

The questions involved in this case are:

1. Whether a payment made by a National Bank to its depositor under the circumstances above enumerated, was

a void payment, because of R. S. 5242 (Sec. 91 of Banking Act).

2. Whether a payment made under the circumstances enumerated can be set aside as fraudulent, regardless of R. S. Sec. 5242, on the theory that the President of the Corporation depositor, took advantage of his inside or confidential information, gained in his capacity as a Director of the Bank, and assisted his Corporation to a preference by means thereof.

3. Whether, in the application or construction of R. S. 5242, the intention of the payee of the fund withdrawn from a National Bank, to obtain a preference for himself, is what is inhibited by the Section, or does the Section, in so far as it relates to intention, apply only to the intention of the Bank or its paying Officers.

4. Whether a counterclaim of such corporate depositor, seeking a recovery against the Receiver for deposits made when the Bank was hopelessly insolvent, on the theory that it was such fraud on the part of the Bank, in receiving the deposits, that the title thereto did not pass to the Bank, can be denied on the theory that knowledge by the depositor's President of facts which indicated the Bank was in a precarious condition, gained by him as a Director of the Bank, is chargeable to the depositor because he was its President.

5. Whether a money decree against the President of the depositor may be lawfully entered, where the proof is conclusive that the payment by the Bank was not made by him; that he received no benefit from it, and that the payment which is avoided by Section 5242 was admittedly made to the depositor and not to the President.

Statute Involved.

The Statute under which decree was rendered is Section 5242 of the Revised Statutes (12 U. S. C. A. Sec. 91) and is as follows:

> "All transfers of notes, bonds, bills of exchange or other evidences of debt owing to any national banking association or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

Statement.

The facts out of which this controversy grows are, in brief, as follows:

Petitioner, Mechanics Universal Joint Company (hereinafter for brevity called the "Joint Company") was in 1931 a manufacturing corporation with a plant and factory in Rockford, Illinois. It was a subsidiary of Borg-Warner Corporation, which owned all its shares except Directors' qualifying shares (Record 105).

Eric S. Ekstrom, President of the Joint Company, was also a Director of the Manufacturers National Bank and Trust Company of Rockford, hereinafter called "Manufacturers Bank".

The petitioner, Joint Company, in June, 1931, maintained deposits in various Banks in Rockford, Illinois, as follows: (Record 87)

1 In Manufacturers Bank

2. In Security National Bank
3. In Third National Bank
4. In Rockford National Bank
5. In Swedish American National Bank

During the months of May and June, 1931, the Joint Company had deposited in the Manufacturers Bank in its commercial or checking account the following amounts on the dates stated: (See Plaintiff's Exhibit 3, Record 123-124)

May 6	$ 167.19
May 9	28,021.33
May 15	24,911.68
May 18	25,000.00
May 23	534.35
May 25	4,163.00
May 28	2,928.61
May 29	10,149.61
May 30	284.44
June 1	10,195.28
June 6	44,617.21

(Record 188) (Record 123-4).

It also maintained a savings account in said Bank of $10,000.00 (Record 98).

On June 12, 1931, the Joint Company had on deposit in the Manufacturers Bank a balance, in its checking or commercial account, of $63,224.30, and a balance on deposit in its savings account of $10,000.00 (Finding 8, Record 188).

On June 12, 1931 petitioner drew its check on the Manufacturers Bank for $42,761.12, payable to itself. This check was signed by Officers of Joint Company as follows: By Eric Ekstrom, President, and H. E. Gustafson, Secretary-Treasurer, and on the back was endorsed by the Joint Company to Third National Bank of Rockford (Record 133). This check was mailed to Third National Bank of Rockford on June 12, 1931 together with a deposit slip directing the Third National Bank to deposit the amount of same to the

credit of the Joint Company with said Bank (Plaintiff's Exhibit 2, Record 122). This check was received by the Third National Bank in due course of mail and was presented by it for payment, through the Rockford Clearing House, on Saturday, June 13, in the morning clearings of that date (Record 38) and the same was paid and honored by the Manufacturers National Bank on presentation.

The Manufacturers National Bank remained open for business during the whole banking day of June 13, 1931 and during that day it met and honored every demand made upon it and took and received every deposit tendered to it (Finding 23, Record 192) and was able to and did meet all its obligations as they matured.

On Thursday, June 11, 1931, one Floberg, the President of the Rockford Clearing House, who also happened to be President of the Manufacturers National Bank, had received notice from the President of the Security National Bank that the latter Bank might likely not be able to meet its clearings, and Floberg, as President of the Clearing House, had relayed the information to the National Bank Examiner at Chicago, and had received word from the Examiner that the Examiner would immediately proceed to Rockford, which he did, arriving there on the morning of June 12. The Examiner first went to the Security Bank and made tentative arrangements by which the Swedish American Bank would take over the Security Bank, subject to an appraisal of assets of the latter Bank, and had secured a contract for said take-over, subject to said appraisal, signed by both Banks involved. (Record 38-39) About eleven o'clock in the morning of June 12, the Examiner (Baty) attended a meeting of the Directors of the Manufacturers Bank which he had requested the President of the Bank to call, and at said meeting Ekstrom, a Director of the Bank, who was also President of the Joint Company, was present.

The Examiner at this meeting briefly discussed the banking situation, told of the situation in which the Security Bank found itself, stated he had arranged for a take-over of the Security Bank by the Swedish American Bank and stated that this situation, whether the take-over was effected or not, in his opinion, would cause uneasiness and a critical bank situation in Rockford the following Monday, and expressed his opinion that the situation would result in a run on all Banks in Rockford on the following Monday, and stated it as his opinion that the anticipated run would be so severe that the Manufacturers Bank could not withstand it, on account of its low cash reserves, and he suggested that "it would be for the best interests of the banking situation for their Bank to try and arrange some place to take their deposit liability under cover." He outlined to them that there were four National Banks on the east side of the river in Rockford, and that with two National Banks on the east side the banking position would be much better. The Directors expressed the opinion they could stand any kind of a run that developed. The Examiner stated their cash reserves were entirely too low for the Bank to weather any continued drain of deposits and it was his opinion, and the opinion of the Chief Examiner, that they would require far greater cash reserves. (See Record 39-40) As a result of this meeting the Directors of the Manufacturers Bank authorized Baty to discuss a possible merger of said Bank with any Bank of Rockford. Committees were appointed by the Manufacturers Bank to meet with a Committee of the Bank with whom Baty was to negotiate to effectuate the proposed merger.

This conference between the Bank Examiner Baty and the Directors of the Manufacturers National Bank terminated about noon on Friday, June 12, 1931, and after that meeting the Bank continued to function in its ordinary way and the balance of that banking day, June 12, and all of

the banking day of June 13, during which days it committed no act of insolvency, it met, in due course, all of its obligations as they matured, received all deposits which were tendered to it and in every respect conducted its business as a solvent, going Bank. When it closed at the end of the day's business on Saturday, June 13, it closed with the expectation on the part of all its managing officers that it would reopen for business the following Monday, as usual. It was faced with no matured obligation that it was unable to meet. It closed on Saturday at the conclusion of the day's business with approximately half a million dollars in cash, or its equivalent, in its vault, or on deposit in other Banks. (Record 44. See also Defendants' Exhibit 5, Record 171) This consisted of

Cash	$253,240.06
On deposit, Federal Reserve	220,181.21
On deposit in other Banks	12,435.94

At the time the payment in question was made, not a single one of its managing officers contemplated the commission of an act of insolvency or contemplated the closing of the Bank. After the Bank closed for its day's business on Saturday, which was after the payment of the check in question, a meeting was held between a Committee from the Third National Bank of Rockford and a Committee from the Manufacturers National Bank, which had been arranged by Examiner Baty, for the purpose of appraising the assets of the Manufacturers National Bank, as a part of the negotiations for the merger which the Bank Examiner was endeavoring to effectuate. This meeting between the Committees from the two Banks convened at seven o'clock in the evening of June 13, at the Manufacturers National Bank, after the Bank had closed its business for that day, and continued in session until the following morning. No conclusion was arrived at as to the merger at that meeting. Nothing was done at that meeting except to go over the

assets of the Manufacturers National Bank and there was some discussion as to the value of some of the assets, but no conclusion was reached as to the value of any of the assets. (See testimony of Achor, Record 61-62) On Sunday night, June 14, the Directors of the Manufacturers National Bank were called together, and at that time the Directors were advised by Examiner Baty and Chief Bank Examiner Leyburn, that the Third National Bank of Rockford would not consider the proposed merger unless the Directors of the Manufacturers National Bank would turn over to the Third National Bank certain specified assets of the Manufacturers National Bank, and in addition thereto, would pay to the Third National Bank $750,000.00 in cash, and that this payment would have to be made before Bank opening time on Monday morning, June 15. The Examiner further stated that he knew it was impossible for the Directors of the Manufacturers Bank to comply with the demands of the Third National Bank within the time specified, and he demanded that the Directors of the Manufacturers National Bank adopt a resolution (Plaintiff's Exhibit 6, Record 126),

> "That due to frozen and non-liquid assets, it is the opinion of the members of this Board convened that the interest of the depositors of this Bank can best be preserved by suspending business and placing the affairs of this Bank in the hands of the Comptroller of the Currency: Now, therefore: BE IT HEREBY RESOLVED; that the business of this Bank be suspended and placed in the hands of the Comptroller of the Currency."

The Bank Directors protested that the Bank was not insolvent and at first refused to adopt the resolution which the Examiner had already prepared previous to the meeting, but under threat of prosecution by the Comptroller, of the Directors, if they kept their Bank open, and received deposits, the Directors reluctantly passed the resolution, which is found in the Record at Page 126, after the same was somewhat modified. (See also Record 104).

There is no question but that the first time the Directors of the Manufacturers Bank or any of its Officers knew that the Bank would not resume business on Monday, June 15, was at the meeting on Sunday evening, June 14, and this was approximately thirty-six (36) hours after the payment of the check in question.

The Record contains no proof that prior to the payment of the check in question the Manufacturers National Bank had committed any act of insolvency, nor that its Officers contemplated the commission of an act of insolvency, and neither the District Court nor the Court of Appeals found that any act of insolvency had been committed, or was contemplated by any of the Officers of said Bank at the time of the payment of said check. The theory upon which the decree was rendered, and sustained by the Court of Appeals, as we understand it, is that although the Manufacturers Bank was keeping open and doing business in the regular way and holding itself out thereby to be a solvent, going institution on June 12 and 13, yet, its condition was, in fact, precarious, and that the Officers of the Bank should have suspended payment sooner than they did, and the Bank's Officers should have known that the Bank was insolvent at the time the check in question was paid by it, and because they should have known it, it will be presumed that they paid the check in question "with a view" of preferring the Joint Company, or of preventing the application of the Bank's assets as provided by the National Banking Act.

Rulings of the Court Below.

It is our contention that the decree of the Court below, on the merits, was erroneous and against the established Federal Law; that the Court erroneously admitted in evidence Plaintiff's Exhibits 22, 24 and 25, and that these latter Exhibits formed the only basis upon which the District

Court or the Court of Appeals could base the decree. Plaintiff's Exhibit 22 was a letter from the Comptroller of the Currency to the Board of Directors of the Manufacturers National Bank, dated January 8, 1931, together with an Examiner's Report of the condition of said Bank for the period ending December 4, 1930 (Record 242, 243, 244, 245, 246, 247). Plaintiff's Exhibit 24 is a letter from the Comptroller of the Currency to the Board of Directors of the Manufacturers National Bank, dated May 28, 1931 (Record 248-249) and Plaintiff's Exhibit 25 is the Examiner's Report of the condition of the Manufacturers National Bank, concluded on May 1, 1931 (Record 250, 251, 252 and 253). These letters and reports shown by the above Exhibits are the usual and customary reports of examination by the agents of the Comptroller, and the usual letters from the Comptroller to the Directors of the Bank submitted by the Comptroller with said report. The reports of examinations made by the Examiners to the Comptroller, while showing some criticized assets, and some losses, and some doubtful assets, fall far short of showing that the Bank was insolvent at the time of the examinations, and the letters of the Comptroller to the Directors of the Bank, while criticizing numerous assets and demanding speedy liquidation of the same or further security for the same, do not state that the Bank was insolvent at the time the letters were written, and there is no finding or statement by the Comptroller in any of the letters that the Bank was insolvent. The Bill of Complaint in this case does not count upon the insolvency of the Bank, nor has it any reference to the condition of the Bank prior to June 12, 1931, and there is no allegation of the Bill of Complaint which is proved in any way by the Plaintiff's Exhibits 22, 24 and 25. It is petitioner's contention that these Exhibits have no competency as against the depositor of the Bank, namely, the Mechanics Universal Joint Company, and the

Exhibits, taken together, amount to nothing more than the unsworn opinions of public officials as to the value and character of certain assets of the Bank. The reports of examination are not public documents but are confidential documents, the reports of the Examiners being for the use of the Comptroller only and the letters from the Comptroller to the Directors being confidential communications from the Comptroller to them.

Reasons for Granting the Petition.

Section 5242 of the Revised Statutes (U. S. C. A. Sec. 91) has been in force for many years. It was originally enacted in 1873. It has been construed by the Supreme Court of the United States in only two cases, namely, *McDonald* v. *Chemical National Bank,* 174 U. S. 610; 43 L. Ed. 1106, and *National Security Bank* v. *Butler,* 129 U. S. 223; 32 L. Ed. 682. The Section has been construed in a multitude of cases by the various Circuit Courts of Appeal, and as we view it, there is an entire lack of harmony in the principles announced governing the construction of this Section. It is our contention that the decision in the case at bar is in conflict with the principles announced by this Court in the *McDonald* case and *Butler* case, *supra.* The decision in the case at bar is directly in conflict with the decisions of the Circuit Court of Appeals of the Second Circuit in the cases of *Hayden* v. *Chemical National Bank,* 84 Fed. 874, and *Nelson* v. *Lewis,* 73 Fed. (2) 521, and with the decision of the Circuit Court of Appeals of the Tenth Circuit in the case of *Rucker* v. *Kokrda,* 68 Fed. (2) 73.

During the recent depression hundreds of National Banks throughout the country have suspended business and the cases pending, founded upon Section 5242 of the Revised Statutes, are numerous. We have been unable to ascertain the number of cases still pending founded upon

this Statute but are advised that there are a number of cases pending in the District Court of the United States for the Northern Division of Illinois, which are yet undisposed of, and we have no doubt but that the same condition prevails in nearly every District Court in the United States. The last occasion that this Court has had to examine this Statute and construe the same was in the year 1899 in the case of *McDonald* v. *Chemical National Bank, supra,* and if the construction by this Court in that case is correct, and is correctly understood by petitioners, that construction was not followed by the Circuit Court of Appeals of the Seventh Circuit in the case at bar, and it is of vital importance, not only to the people of the United States, but to the members of the profession of the United States to be able to determine the liability of a depositor who withdraws money from a National Bank shortly before it suspends business. A determination by this Court of the proper construction of Section 5242 will enable counsel to correctly advise those clients who are sued under said Section whether to settle or to litigate the controversy. Great numbers of cases are reported in the Federal Reports of cases based upon this Statute. In most of them, the payments were made after an act of insolvency and there is no question but that the liability exists. In the case at bar the payment was not made after an act of insolvency had been committed by the Bank, nor was it made in contemplation of the commission of an act of insolvency by the Bank, nor was it "made with a view to prevent the application of the Bank's assets in the manner prescribed" by law, or "with a view to the preference of one creditor to another".

It is of the utmost importance that Bank depositors in National Banks throughout the United States know, by an authoritative opinion of this Court, whether the portion of the Statute "with a view to prevent" or "with a view to the preference" has reference to the intention on the part of

the managing Officers of the Bank who are making the payment, or has reference to the intention of the recipient of the payment. That question has never been decided by this Court except in the case of *National Security Bank* v. *Butler, supra,* where this Court has held that the intention indicated by the words "with the view to" has reference only to the intention of the paying officers of the Bank. In the case at bar the lower Courts have construed the Statute as though the intention evidenced by the words "with the view to" has reference to the person receiving the payment. In view, therefore, of the uncertain condition of the law with reference to the construction of this Statute, and in view of the fact that the decree below was and is probably in conflict with the decisions of this Court, we believe the case presents a question of sufficient public importance to justify this Court in re-examining this Record.

It is the contention of petitioners that the following principles of law are firmly established:

I.

That before a Court is justified in declaring a payment, made by a National Bank, at the time the Bank is open for business, accepting all deposits tendered to it and meeting all demands which were made upon it, to a bona fide creditor, void by reason of R. S. 5242, the conditions imposed by Congress in said Section rendering the payment void, must appear in the evidence; that these conditions are, (1) that the payment must be made after the commission of an act of insolvency, or, (2) in contemplation of an act of insolvency, and in addition thereto the payment must be made "with a view" or with the intent *on the part of the paying officers of the Bank* either (a) to prevent the application of the Bank's assets in a manner provided by the National

Banking Act, or, (b) to prefer the payee over other creditors of the Bank.

II.

That the fact that the Officers of the Bank at the time the payment was made, in fact knew that the Bank was insolvent and would ultimately be forced to suspend business unless a favorable turn took place, or new money was obtained, is not sufficient to raise the presumption that the payment was made with the intent on the part of the Bank's Officers to prevent the application of the Bank's assets in the manner provided by Law, or to prefer the payee over other creditors, where the payment was made at a time when the Bank was able to and did meet all of the demands made upon it as they were made and was receiving all deposits which were tendered to it, and where the proof fails to show that the Bank was faced with any maturing obligation which it was unable to meet.

III.

That in the construction and application of R. S. 5242 the intent which is referred to in said Statute by the words "with a view to" has no reference to the intent of the payee but has reference only to the intent of the paying officers of the Bank.

IV.

That R. S. 5242 provides the only statutory condition for declaring a payment made by a National Bank to its depositor void. That neither at Common Law nor under any established rule of equity can a payment made by a National Bank to its depositor, who is not an officer or stockholder of

said Bank, be declared void, because of the intent of the depositor in making the withdrawal. Both at Common Law and in equity diligent creditors, regardless of their motive or intent, are favored.

Respectfully,

S. R. KENWORTHY,
Moline, Illinois,
Solicitor for Mechanics Universal Joint Company.

SHELBY L. LARGE,
Rockford, Illinois,
Solicitor for Grace Ekstrom, Administratrix of Eric S. Ekstrom, Deceased.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF.

I.

The decision of the Court below in so far as it holds that a recovery can be had from the recipient of a payment of money, under R. S. 5242, without proof (1) that the payment was made after the commission of an act of insolvency, or (2) in contemplation of an act of insolvency, and

that the payment can be avoided regardless of such proof without it further appearing from the evidence that the payment was made

(a) with a view to prevent the application of the Bank's assets in a manner prescribed by the National Banking Law, or

(b) with a view to the preference of one creditor to another

is a construction of an Act of Congress (R. S. 5242), which is in conflict with the following decisions of Circuit Courts of Appeals of other Circuits, viz:

Second Circuit.

Nelson v. *Lewis,* 73 Fed. (2) 521-3.

Hayden v. *Chemical National Bank,* 84 Fed. 874-5-6.

Tenth Circuit.

Rucker v. *Kokrda,* 68 Fed. (2) 73 (75).

II.

The holding of the Court below in so far as it intimates that the decree can be sustained regardless of Section 5242 on the theory that the President of the Corporation depositor took advantage of his inside or confidential information, gained in his capacity as Director of the Bank, and assisted his Corporation to a preference by means thereof, is probably in conflict with the decision of this Court in the case of *The Sanford Fork and Tool Company* v. *Howe, Brown & Company,* 157 U. S. 312 (317), 39 L. Ed. 713.

III.

The opinion of the Court below, in the construction of a Federal Statute, in so far as it holds, with respect to a payment by a National Bank in the due course of its busi-

ness and at a time when it was open receiving deposits and meeting all demands made upon it as they were presented to it, where the Bank was insolvent and known by its Officers to be such, that such payment is void, because the Officers making the payment are presumed to have made the payment with the intent to prefer the payee or with an intent to prevent the application of the Bank's assets according to the Banking Law, is contrary to, and at variance with, the construction which this Court has given said Act in the case of *McDonald* v. *Chemical Bank,* 174 U. S. 610 (613), 43 L. Ed. 1106 (1109). And is in conflict with the decision of the Second Circuit Court of Appeals in *Hayden* v. *Chemical National Bank,* 84 Fed. 874-5-6 and *Nelson* v. *Lewis,* 73 Fed. (2) 521 (523) and of the Court of Appeals of the Tenth Circuit in *Rucker* v. *Kokrda,* 68 Fed. (2) 73 (75), and this conflict is recognized by the dissenting opinion of McDermott, Judge, of the Circuit Court of Appeals of the Tenth Circuit in the case of *Aycock* v. *Bradbury,* 77 Fed. (2) 14 (18).

IV.

The opinion of the Court below in so far as it holds that in the proper construction of a Federal Statute (R. S. 5242) the intention of the recipient of the payment to prefer himself over other creditors is sufficient to start in operation the Statute in question in the absence of proof that the paying officers of the Bank, when said payment was made, had such intention, is at variance with, and in direct conflict with, the holding of the Circuit Court of Appeals of the Fourth Circuit in the case of *Lucas* v. *Federal Reserve Bank,* 59 Fed. (2) 617, and is probably in conflict with the holding of this Court in the case of *National Security Bank* v. *Butler,* 129 U. S. 223, 32 L. Ed. 682.

Opinions Below.

The decree of the District Court below, and the decision affirming the same by the Circuit Court of Appeals of the Seventh Circuit, in effect decide that, although there was no proof in the Record that the payment in question was made after an act of insolvency had been committed (and the District Court expressly so held in its finding of Fact Number 24, Record 193), and in the absence of any proof in the Record, or finding of fact, that the payment was made in anticipation of an act of insolvency, that nevertheless the payment was within the condemnation of R. S. 5242; which holding is, we believe, erroneous and in conflict with other decisions of Circuit Courts of Appeal of other Circuits; and by the decisions of both Courts in the case at bar it was, in effect, held that the fact that, after the payment, the Comptroller of the Currency found the Bank to be insolvent, and that because the Comptroller previous to the payment had criticized some of the assets of the Bank, and the National Bank Examiner previous to the payment had advised the Directors and Officers of the Bank that in his opinion the Bank, because of other conditions prevailing in the City, was probably faced with a run, which, in the opinion of the Bank Examiner, would be so protracted that the Bank probably would be unable to meet the same, was sufficient to raise the presumption that the Officers of the Bank, in making said payment, did so with an intent to prefer the payee over other creditors of the Bank, or, to prevent the application of the Bank's assets in the manner provided by the National Banking Act, notwithstanding the payment in question was made at a time when the Bank was open for business and able to meet and did meet every demand which was made upon it.

The decisions of both the District Court and the Circuit Court of Appeals in the case at bar decided, in effect,

that regardless of Section 5242 there could be a recovery, upon the theory, as we understand it, that it was unlawful at Common Law, for the Officers of a National Banking Corporation, whose Directors should have known that the Bank was insolvent, and that closing was imminent, to pay a creditor, who made a demand upon it for payment of a legitimate debt due, if the inference can be legitimately drawn that the creditor, in making its demand, was actuated by inside information as to the condition of said Bank.

We believe and assert that in reaching both conclusions above enumerated, the decisions of the lower Courts were not only erroneous, but are in conflict with the decisions of other Courts of Appeal construing the same Statute, and are probably at variance with the decisions of this Court on both propositions.

The Facts.

The facts are briefly set forth in the petition for Certiorari filed herewith, and are also stated with substantial accuracy in the opinion of the Circuit Court of Appeals, and for sake of brevity we refer thereto without re-statement.

ARGUMENT.

I.

CONFLICT OF DECISIONS.

The conflict between the decision and decree of the Circuit Court of Appeals of the Seventh Circuit and the Circuit Courts of Appeals of other Circuits is sharp and plain. This inconsistency has to do with the construction and interpretation of a Federal Statute, namely, Revised Statutes, Section 5242. The decision of the Circuit Court of Appeals of the Seventh Circuit is contrary to that of other Circuit Courts of Appeals of other Circuits in that:

(a) The Court in the Seventh Circuit, in effect, holds that a payment by a National Bank in due course of its business to a *bona fide* creditor, is void, under said Section, even where no act of insolvency had been committed prior to the payment, and where no act of insolvency was in contemplation of the Bank's Officers at the time of the payment, but solely and only on the ground the Bank was insolvent at a later date, and there had been no appreciable change in its condition between the date of payment and the date the Court holds the proof shows the Bank was insolvent. The Court of Appeals of the Seventh Circuit in the opinion in the case at bar states (Record 235):

> "They" (Appellants) "insist, therefore, that the decree was not justified because (1) the Bank had committed no act of insolvency before the payment of the check, (2) there was no proof of insolvency, (3) none of the Officers of the Bank believed that the Bank was insolvent when the check was paid, and (4) none of the Officers, at the time the check was paid, contemplated an act of insolvency or the closing of the Bank.
>
> "The Court found that fact (1) was true. But, even so, that fact of itself would not invalidate the decree.

> The Court also found that the Bank was insolvent on Sunday, June 14, and that there had been no appreciable change in its condition since June 12, the day of the Directors' meeting. (Record 235-236) That finding, we think, was supported by material evidence and we cannot disturb it. It may be true that none of the Officers thought it was insolvent, or contemplated an act of insolvency or the closing of the Bank, but, in view of the condition disclosed, and the reports and correspondence from the Comptroller, together with the advice and suggestions of the Examiner, we are convinced that the Officers and Directors should have known that the Bank was insolvent, and that closing was imminent."

The implication of this language is to place a construction on said Statute directly contrary to the Courts of Appeal of other Circuits. Practically the same question, construing the same Statute, was before the Circuit Court of Appeals of the Tenth Circuit in the case of *Rucker* v. *Kokrda*, 68 Fed. (2) 73. If the Court will pardon us, we will quote extensively from *Rucker* v. *Kokrda* in so far as the opinion is directed to this point. On Page 75 of the opinion the Court, after quoting Section 5242 of the Statute, said:

> "Did Congress intend to avoid all payments made to depositors in the usual course of business if it later develops that the Bank, while open, was in fact, insolvent? Before attempting a line-by-line analysis of the Section, two reasons immediately suggest themselves which negative any such intent. First, if Congress so intended, a single sentence avoiding all payments made when a Bank is insolvent would have sufficed; that Congress hedged its mandate about with many qualifying clauses belies any such sweeping intent as Appellee contends for. Second, the whole structure of the Banking Act, of which this is a part, is designed to inspire confidence in depositors, to the end that the moneys of the community might be turned into channels of trade. If this section is construed to avoid payments to depositors in regular course, Congress has injected a justifiable apprehension into the

minds of the depositors whose fears it has constantly endeavored to allay. There would be little confidence left in our National Banks if a depositor knew that even if he got his money out before the Bank closed, he might be harried with later suits to redeposit it.

"While the Statute is somewhat confusing, we do not find in it such far reaching intent. There being no transfer or assignment of any securities in the present case, Part (A) of the Section has no application. The payment was one of money and comes within Part (B). Such payments are avoided only if certain conditions exist. First, if made 'after the commission of an act of insolvency'. While it is here contended that the Bank was insolvent when the payment was made, the condition is not insolvency, but is that 'an act of insolvency' has been committed. There is no evidence or finding of any act of insolvency in this case prior to the payment. Second, the payment may be avoided if made 'in contemplation' of an act of insolvency. When this payment was made, the decision to close the doors on the following morning had not been reached. That decision was not arrived at until late that night. True, the Officers knew that unless new money was interested, or confidence restored, the Bank could not indefinitely meet its customers' demands; but when this payment was made, the Officers were hopeful that the negotiations of the night would avert the necessity of an act of insolvency. This payment was, therefore, not made in contemplation of the later act of insolvency. But this is not all; not only must the payment meet either condition (1) or (2)" (that is, after an act of insolvency or in contemplation thereof) "but it must also meet either condition (A) or (B), that is, be made either with a view of preventing the application of its assets as provided by the Banking Act or to prefer one creditor over another. The Banking Act contemplates that depositors should be paid on demand; paying a depositor's check on presentation can, therefore, scarcely be said to be outside the contemplation of Congress in creating National Banks; nor can there be a purpose to prefer one depositor over another when the payment is made at a time when all depositors are being treated exactly alike, the checks of all being paid upon presentation."

The Court of Appeals of the Second Cilrcuit in the case of *Nelson* v. *Lewis*, 73 Fed. (2) 521 adopts the reasoning in the case of *Rucker* v. *Kokrda, supra.*

The decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar is predicated upon the finding of the District Court

> "That the Bank was insolvent on Sunday, June 14, and there had been no appreciable change in its condition since June 12, the day of the Directors' meeting."

In the case of *Nelson* v. *Lewis*, 73 Fed. (2) 521, the Court of Appeals of the Second Circuit said (page 523):

> "While the Bank was insolvent in the sense that its assets did not equal its liabilities, the question is presented as to whether it could meet its obligations as they matured. The only evidence tending to support a claim that it could not do so is the fact that there was no material change in the Bank's condition between April 1, 1931 and April 8, 1931, the date when the Comptroller of the Currency closed the Bank because of its insolvency."

Discussing this evidence, the Court in *Nelson* v. *Lewis*, after commenting upon the fact that the Bank was open daily for business when the payments in question were made, and remained so open up to April 8, and nothing otherwise indicated that it could not meet its obligations as they matured, then said:

> "Even assuming that the Bank was insolvent on the date of the withdrawals, was this fact known to the Officers? * * * The cases where illegal preferences have been held to have been made show either actual knowledge of insolvency on the part of the Officers (*American Surety Co.* v. *Jackson*, 24 Fed. (2) 768; *National Security Bank* v. *Butler*, 129 U. S. 223) or that the Officers could not help but know because of the assets being greatly below the liabilities. None of the cases hold that there is a presumption of knowledge of insolvency. *McDonald* v. *Chemical National Bank*, 174 U. S. 610, held that an intent to prefer cannot be presumed merely from the fact that the Bank is actu-

ally insolvent and that such condition is known to the Officers."

The same inconsistency between the decision of the Court of Appeals of the Seventh Circuit and other Courts of Appeal will be found by comparing the decision in the case at bar with the decision in *Hayden* v. *Chemical National Bank,* 84 Fed. 874. On Page 876 of the report of the *Hayden* case, that Court, said:

> "The Capital Bank had not committed an act of insolvency. Assuming that its managers knew that its liabilities greatly exceeded its resources, and that it would presently be unable to meet its obligations and have to suspend, there is no evidence that the payments in controversy were influenced by that knowledge. A payment to a depositor or other creditor, in the usual course of the Bank's business as a going concern, and not preparatory in any sense to the anticipated insolvency of the Bank, is not, we think, within the condemnation of the Statute. An act done by a Corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency * * *. We are therefore of the opinion that the payments were valid if the remittances belonged to the Defendant from the time they were in the course of transmission to it by mail."

The decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar is, as we read it, directly in conflict and out of harmony with the decision of the United States Supreme Court in the case of *McDonald* v. *Chemical National Bank,* 174 U. S. 610, in so far as the Circuit Court of Appeals holds that the condition of the Manufacturers Bank, as disclosed by the reports and correspondence from the Comptroller, together with the advice and suggestions of the Examiner, are sufficient upon which to base the holding that the Officers and Directors "should have known that the Bank was insolvent and that closing was imminent." In the *McDonald* case, on Page 618, this Court said:

> "Nor can a finding that the payments and remit-

tances made to the Chemical National Bank on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that Bank be. based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that Banks and other Corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the Bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency affairs may take a favorable turn, and thus suspension of payments and of business be avoided."

The situation so described in the McDonald case is the one presented by this Record. This Court further said in the McDonald case, that there was no act of insolvency shown, since the Bank had not failed to pay any depositor or demand up to the hour of closing. The same facts appear from the undisputed evidence in the case at bar. Then comes the significant statement of this Court, as we view it, a part of which we italicize (Page 618):

"It may be that those of its Officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the Defendant Bank. The Chemical National Bank was no more preferred by these remittances several days before suspension *than were the depositors whose checks were paid an hour before the doors were closed.*"

The general disagreement among the Circuit Courts of Appeal is illustrated by the case of *Aycock* v. *Bradbury*, 77 Fed. (2) 14. In that case the Comptroller had determined that the Bank was insolvent and had levied an assessment.

The Bank remained open, however, and on the day prior to suspension of business, allowed a depositor to select notes and warrants out of the note case of the Bank. The majority of that Court held that the Bank was in contemplation of insolvency at the time the transfer was made. McDermott, Circuit Judge, in a vigorous dissenting opinion, stated (Page 18):

> "The Comptroller, his counsel advises us, has acquiesced in the decision of the Second Circuit Court of Appeals in *Nelson* v. *Lewis*, 73 Fed. (2) 521. There a bank was insolvent, although the Comptroller and none of its officers except its Cashier, knew it. There a depositor asked for his money and was told that the Bank could not pay his check. There the depositor took securities for his balance. The Circuit Court of Appeals held the transaction was in the ordinary course of business and unassailable. The rights of a depositor in a National Bank in Oklahoma ought to be the same as the rights of a depositor in a National Bank in New York. While it seems to me that taking securities instead of cash for a deposit is not done in the ordinary course of banking business, yet that is the law in the Second Circuit; it ought to be the law as to all National Banks until the Supreme Court says to the contrary."

II.

WHETHER A PAYMENT MADE UNDER THE CIRCUMSTANCES ENUMERATED CAN BE SET ASIDE AS FRAUDULENT, REGARDLESS OF REVISED STATUTES, SECTION 5242, ON THE THEORY THAT THE PRESIDENT OF THE CORPORATION DEPOSITOR, TOOK ADVANTAGE OF HIS INSIDE OR CONFIDENTIAL INFORMATION, GAINED IN HIS CAPACITY AS DIRECTOR OF THE BANK, AND ASSISTED HIS CORPORATION TO A PREFERENCE BY MEANS THEREOF?

It will be noted in the case at bar that the Circuit Court of Appeals of the Seventh Circuit does not expressly pass upon this question, but intimates in its opinion that regard-

less of Section 5242 there might be a recovery. (See Opinion, Record 236). In the case at bar, Ekstrom, the President of the Joint Company, who was also a Director of the Manufacturers National Bank, received no preference himself. No money was paid to him by the Bank. He had no interest in the money which was paid to the Joint Company. Ekstrom had a substantial deposit in the Bank in his own name but he did not seek to take advantage of the information which he received, as a Director of the Bank, to withdraw any of his own money. He profited in no way by the payment. He may have assisted his employer, the Joint Company, to withdraw its deposit, but in the absence of a Statute, we claim this Court has held, there could be no recovery of a payment made to his employer under the circumstances shown by this Record. Substantially the same state of facts existed in the case of *The Sanford Fork & Tool Company* v. *Howe, Brown & Company,* 157 U. S. 312; 39 L. Ed. 713. In that case this Court said (Page 317):

> "The case involves no breach of trust on the part of the agent towards the principal, but more closely resembles the case of an individual debtor giving preferences to certain of his friends, and the general rule is that, in the absence of Statute, a debtor has such *jus disponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment."

So far as we are able to determine, *The Sanford Fork & Tool Company* case is the only case decided by this Court which is exactly in point.

The question has been frequently before the Courts of Illinois, where this action arose, and in the following cases the Courts of Illinois have held that, in the absence of a Statute, there is no rule at Common Law which prevents a debtor, whether an individual or a Corporation, from law-

fully preferring any creditor it may choose. *Young* v. *Clapp,* 147 Ill. 176; *Plume Co.* v. *Caldwell,* 136 Ill. 163; *Cooper* v. *McClun,* 16 Ill. 435; *Gibson* v. *Rees,* 50 Ill. 383; *Blow* v. *Gage,* 44 Ill. 208; *Howell* v. *Edgar,* 4 (Scam.) Ill. 417; *Hudson* v. *Maze,* 4 (Scam.) Ill. 578.

And it has further been held by all of the authorities we have been able to find, that the fact of relationship of the person to whom preference is given to one or more of the Directors or Officers of the Corporation, does not invalidate the transaction, if it is otherwise fair and free from fraud. *Rockford Grocery Co.* v. *Grocery Co.,* 175 Ill. 89; *Illinois Steel Company* v. *O'Donnell,* 156 Ill. 624; *Ragland* v. *McFall,* 137 Ill. 81; *Blair* v. *Illinois Steel Co.,* 159 Ill. 353; *State National Bank* v. *Union Bank,* 168 Ill. 526; *Warren* v. *National Bank,* 149 Ill. 9; *Gottlieb* v. *Miller,* 154 Ill. 44.

Of course, it has been recognized by many Courts which adopt the principle that Directors of insolvent Corporations are Trustees of the assets for the benefit of its creditors to the extent that creditors must be paid before the assets can be distributed to stockholders or officers, that a payment made by an insolvent Corporation to its stockholders or officers is void, because it is abhorrent to equity to permit Directors, or stockholders, or officers, to use the trust funds in their hands *to prefer themselves,* if they happen to be creditors, over other creditors not so situated. But that doctrine has no application to the case at bar because, in the case at bar, Ekstrom received none of the payment that was made by the Bank to the Joint Company; he had no interest in it; he did not profit by it, and unless there is some Statute which makes the payment to a creditor void, there is no principle of Common Law or Equity which renders the payment void. The Joint Company was not an Officer of the Bank, nor was it a Director of the

Bank, nor had it any interest in the Bank, except that, by reason of its deposits, it was a creditor thereof.

The Court of Appeals of the State of New York in a case almost exactly similar to the case at bar, and construing a Statute of that State that is substantially the same as Section 91 of the National Banking Act, in the case of *O'Brien, Receiver,* v. *East River Bridge Company,* 161 New York 539; 48 L. R. A. 122, held that the payment by the Bank in question was not a void payment and denied the relief which was granted by the District Court in the case at bar and affirmed by the Circuit Court of Appeals. So far as our industry has rewarded us, this New York case is the only case where the exact question presented by this Record is determined, aside from the determination by the Circuit Court of Appeals in this case.

III.

WHETHER, IN THE APPLICATION OR CONSTRUCTION OF REVISED STATUTE 5242, THE INTENTION OF THE PAYEE OF THE FUND WITHDRAWN FROM A NATIONAL BANK, TO OBTAIN A PREFERENCE FOR HIMSELF, IS WHAT IS INHIBITED BY THE SECTION, OR DOES THE SECTION, IN SO FAR AS IT RELATES TO INTENTION, APPLY ONLY TO THE INTENTION OF THE BANK OR ITS PAYING OFFICERS?

If we correctly understand the basis for the decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar, it is, in effect, that because Ekstrom, President of the Joint Company, with knowledge acquired by him as Director of the Manufacturers Bank, signed the check of the Joint Company at a time when he, as a Director of the Bank, had information that the Bank was in a precarious condition and might shortly close, that this amounted to an intent upon the part of Ekstrom to assist the Joint Company to a preference, and that such knowl-

edge of Ekstrom was imputable to the Joint Company, and therefore that the Joint Company intended to prefer itself over other creditors of the Bank, or intended to prevent the application of the Bank's assets in a manner prescribed by the National Banking Act, and that this intent is sufficient to avoid the payment made by the Bank, in the ordinary course of business of the Bank, and at a time when the Bank was paying all other creditors who presented their demands to it.

In so far as this principle of law is concerned, the decision of the Circuit Court of Appeals of the Seventh Circuit in the case at bar is directly contradictory to the decision of the Circuit Court of Appeals of the Fourth Circuit as announced in the case of *Lucas* v. *Federal Reserve Bank*, 59 Fed. (2) 617.

In the *Lucas* case, it appears that the Federal Reserve Bank, after it had made a loan on collateral security to the National Bank of New Bern, and after it, the Reserve Bank, had determined that the National Bank was insolvent, and its assets frozen and uncollectible, had demanded that the National Bank deposit with it, as additional security for its prior loan, $208,000.00 of additional collateral, which additional collateral the National Bank delivered to the Reserve Bank, and it was claimed in that suit that this was a transfer of collateral made by the National Bank to Reserve Bank in contemplation of insolvency and with a view of granting a preference, and that the transfer was void by reason of R. S., Section 5242. The allegations of the Bill in that respect were:

> "That the Reserve Bank, by reason of its access to examinations made of member Banks, had a more intimate knowledge of the condition of the assets of the National Banks than their own Officers."

In other words, it was contended, by the Bill of Complaint, that the transfer in question was prohibited by Section

5242 solely upon the ground that the intention of the transferee brought the payment within the condemnation of the Statute in question, notwithstanding there was no such intention on the part of the Officers of the Bank who participated in the transfer. The Circuit Court of Appeals of the Fourth Circuit in the *Lucas* case stated (Page 621):

> "The purpose of the Statute was to guard against the wrongful or preferential disposition of the assets of a Bank *by its Officers* in contemplation of insolvency; and the knowledge and intent which it requires for avoiding a transfer, relate to knowledge and intent on the part of the Officers of the Bank, who alone have the power to make the transfer." (Citing cases) "As said by Judge Wallace in the case of *Armstrong* v. *Chemical National Bank, Supra,* 'a Bank is not in contemplation of insolvency until the fact becomes reasonably apparent to its Officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations'. On the other hand, if the Officers of the Bank make the transfer in contemplation of insolvency with a view of granting a preference, the transferee's knowledge or want of knowledge is immaterial." (Citing cases) "If the Officers have no such knowledge, or intent, it manifestly cannot be condemned as preferential, whatever may have been the knowledge or intent of the transferee."

It will thus be seen from the language above quoted that there is a sharp conflict between the Circuit Court of Appeals of the Fourth Circuit in the *Lucas* case and the Circuit Court of Appeals of the Seventh Circuit in the case at bar on this particular question.

IV.

WHETHER A COUNTERCLAIM OF SUCH CORPORATE DEPOSITOR, SEEKING A RECOVERY AGAINST THE RECEIVER FOR DEPOSITS MADE WHEN THE BANK WAS HOPELESSLY INSOLVENT, ON THE THEORY THAT THERE WAS SUCH FRAUD ON THE PART OF THE BANK IN RECEIVING THE DEPOSITS THAT THE TITLE THERETO DID NOT PASS TO THE BANK, CAN BE DENIED ON THE THEORY THAT KNOWLEDGE OF THE DEPOSITOR'S PRESIDENT OF FACTS WHICH INDICATED THE BANK WAS IN A PRECARIOUS CONDITION, GAINED BY HIM AS A DIRECTOR OF THE BANK, IS CHARGEABLE TO THE DEPOSITOR BECAUSE OF THE KNOWLEDGE POSSESSED BY ITS PRESIDENT?

It is not our contention that this branch of the case is of sufficient public importance to warrant the granting of a petition for Certiorari, but it is one of the points which we shall urge to the Court in the event that Certiorari is granted.

V.

WHETHER A MONEY DECREE AGAINST THE PRESIDENT OF THE DEPOSITOR MAY BE LAWFULLY ENTERED, WHERE THE PROOF IS CONCLUSIVE THAT THE PAYMENT BY THE BANK WAS NOT MADE BY HIM; THAT HE RECEIVED NO BENEFIT FROM IT, AND THAT THE PAYMENT WHICH IS VOIDED BY SECTION 5242 WAS ADMITTEDLY MADE TO THE DEPOSITOR AND NOT TO ITS PRESIDENT?

It is not our contention that this question is of that degree of public importance which would authorize this Court to grant Certiorari, but it is one of the points which we seek to have reviewed in the event that Certiorari is granted on other grounds.

Conclusion.

1. It is the contention of Petitioners that neither under the pleadings, the proof, nor the findings of fact of the Court below was the decree justified.

2. That the undisputed proof in the Record conclusively shows the following facts, some of which are found by the Court below, and as to the others there are no contrary findings:

(a) That the payment of the check in question was made by the Manufacturers Bank at a time when it was open for business, accepting all deposits which were tendered to it, and when it was able to and did meet every demand upon it; and it closed at the customary bank closing time of that day, with nearly $500,000.00 in cash available for its creditors, either in its vaults or on deposit in the Federal Reserve Bank and other Banks.

(b) That it closed on Saturday with the expectation of opening for business on the succeeding banking day, Monday.

(c) That it was facing no certain crisis when it closed on Saturday, the day the check in question was paid.

(d) That up to the time it closed it had committed no act of insolvency.

(e) That none of its Officers anticipated or expected it would commit an act of insolvency in the immediate future, at the time the check in question was paid.

(f) That the matters discussed at the Director's meeting of the Bank at the noon meeting of June 12, in no way indicated that the Bank was facing any serious crisis, and none of its Officers thought it was facing any particular embarrassment. All of its Officers who testified expressed their opinions at that meeting that the Bank had enough cash to meet any threatened run.

(g) As a matter of precaution and because of an appeal by the National Bank Examiner to the patriotism and unselfishness of the Directors at the noon

meeting of June 12, the Directors authorized the Examiner to negotiate with some other Bank in Rockford for a consolidation of the Manufacturers Bank, upon the assurance of the Examiner that said consolidation could likely be effected through his influence.

(h) That at the noon meeting of June 12 there was no talk of closing the Bank in the immediate future.

(i) That nothing occurred at the meeting on June 12 that caused Ekstrom concern as to the future ability of the Bank to meet the demands of its depositors.

(j) That there is not a scintilla of proof in the Record, nor is there in the Record any justification for the inference, that the payment of the check in question was made with intent, on the part of the Officers of the Bank, to prefer the Joint Company over any other creditor or to prevent the application of the Bank's assets in the manner prescribed by law.

(k) There is no proof that the Bank was closed because of anything that was anticipated at the meeting of June 12.

(l) The developments after Bank closed for the day on Saturday, and the failure of the Bank Examiner to effect mergers of the Security Bank and the Swedish American Bank, and the failure to effect the consolidation of the Manufacturers Bank and the Third National, and the appraisal made by the latter Bank of assets of the Manufacturers, none of which facts were known or contemplated at the time the check in question was paid, induced the Examiner in Charge to demand the closing of the Bank; and the Directors of the Bank reluctantly and under threat and coercion of the Examiner passed a resolution which turned the Bank over to the Comptroller. This was a sudden turn of affairs not anticipated by any Officer of the Bank prior to Sunday, June 14, at 8 P. M., which was 36 hours after the check in question had been paid.

3. That the Court erred in admitting and considering Plaintiff's Exhibits 22, 23, 24 and 25.

4. Section 5242, Revised Statutes, is not susceptible to the construction that the intent or purpose of the one who received the payment declared void by the Act is of controlling significance.

5. That the affirmative defense made by Defendant, Joint Company, and the counterclaim interposed by it, were amply substantiated by the evidence and a decree should have been entered thereon.

6. The Court below erred in rendering a money decree against Ekstrom.

For all of the reasons stated in the Petition for Certiorari filed in this behalf, we respectfully petition this Honorable Court to grant a Writ of Certiorari in this cause.

Respectfully,

S. R. KENWORTHY,
Moline, Illinois,
Solicitor for Mechanics Universal Joint Company.
SHELBY L. LARGE,
Rockford, Illinois,
Solicitor for Grace Ekstrom, Administratrix of Eric S. Ekstrom, Deceased.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. [redacted]17

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

BRIEF AND ARGUMENT FOR PETITIONERS.

SAMUEL R. KENWORTHY,
Solicitor for Mechanics Universal Joint Company.
SHELBY L. LARGE,
Solicitor for Grace M. Ekstrom, Administratrix of the Estate of Eric Ekstrom, Deceased.

THE GUNTHORP-WARREN PRINTING COMPANY, 330 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 853

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

OUTLINE OF BRIEF.

I.

(1) A subject index of the matter in this Brief, with page references, and

(2) A table of cases alphabetically arranged, textbooks and statutes cited, with reference to page where they are cited.

II.

The official report of the opinion of the Circuit Court of Appeals for the Seventh Circuit is as follows:

Mechanics Universal Joint Company v. *A. B. Culhane, Receiver, etc.*, 80 Fed. (2) 147.

There is no official report of the opinion of the District Court, for the Northern Division of Illinois, Western Division, but its findings of fact are found in the Record here at Pages 185-193, and its conclusion of law at Pages 193-194, and its decree at Pages 195-6.

III.

The suit was instituted by a Federal Administrative Official—the Receiver of a National Bank—to enforce a claim arising in the liquidation of the assets of a National Bank, under and by virtue of a Federal Statute (R. S. 5242).

The petitioners were Defendants in the District Court and did not there, and do not here, challenge the jurisdiction of the Federal Court.

IV.

A CONCISE STATEMENT OF THE CASE.

The decree below was rendered, in an action in equity, instituted by the Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, to recover back from Mechanics Universal Joint Company, a Corporation which was a *bona fide* depositor in said Bank, and to recover against Eric S. Ekstrom, its President, the amount, paid by said Bank on the last day it was open for business, of $42,761.12, being the amount of a check drawn

by Mechanics Universal Joint Company upon said Manufacturers National Bank and Trust Company, payable to the order of said Mechanics Universal Joint Company, and duly endorsed by it to the Third National Bank of Rockford, Illinois, which check was dated June 12, 1931, was sent by mail by Mechanics Universal Joint Company to the Third National Bank of Rockford, and was by said latter Bank presented to the Clearing House of Rockford and duly honored and paid by said Manufacturers National Bank and Trust Company on Saturday, June 13, 1931, in the morning clearings of that day. The check in question was signed by Eric S. Ekstrom, President of Mechanics Universal Joint Company, and by A. E. Gustafson, Assistant Treasurer of said Company. The decree awarded to the Plaintiff a judgment against the Mechanics Universal Joint Company, a Corporation, and Eric S. Ekstrom, in the sum of $25,216.45 (being the amount of the check less certain dividends due to said Mechanics Universal Joint Company in the liquidation of the assets of the Bank, plus interest), and costs. (See Decree. R. 195.) From this decree an appeal was prosecuted to the United States Circuit Court of Appeals of the Seventh Circuit and the decree was there affirmed by an opinion of that Court on November 15, 1935. (See opinion of the Circuit Court of Appeals. R. 231 to 237.) A Petition for Rehearing was duly filed in the Circuit Court of Appeals and on December 31, 1935 was denied. (R. 239.) Petition for Certiorari was duly filed in this Court and allowed.

The facts out of which this controversy arose are, in brief, as follows:

Petitioner, Mechanics Universal Joint Company (hereinafter for brevity called the "Joint Company") was in 1931 a manufacturing corporation with a plant and factory in Rockford, Illinois. It was a subsidiary of Borg-Warner

Corporation, which owned all its shares except Directors' qualifying shares. (R. 105.)

Eric S. Ekstrom, President of the Joint Company, was also a Director of the Manufacturers National Bank and Trust Company of Rockford, hereinafter called "Manufacturers Bank".

The petitioner, Joint Company, in June, 1931, maintained deposits in various Banks in Rockford, Illinois, as follows (R. 87):

1. In Manufacturers Bank.
2. In Security National Bank.
3. In Third National Bank.
4. In Rockford National Bank.
5. In Swedish American National Bank.

During the months of May and June, 1931, the Joint Company had deposited in the Manufacturers Bank in its commercial or checking account the following amounts on the dates stated (See Plaintiff's Exhibit 3, R. 123-124):

May 6	$ 167.19
May 9	28,021.33
May 15	24,911.68
May 18	25,000.00
May 23	534.35
May 25	4,163.00
May 28	2,928.61
May 29	10,149.61
May 30	284.44
June 1	10,195.28
June 6	44,617.21
Total	$150,972.70

(R. 188.) (R. 123-124.)

It also maintained a savings account in said Bank of $10,000. (R. 98.)

On June 12, 1931, the Joint Company had on deposit in the Manufacturers Bank a balance, in its checking or com-

mercial account, of $63,224.30, and a balance on deposit in its savings account of $10,000. (Finding 8, R. 188.)

On June 12, 1931, petitioner drew its check on the Manufacturers Bank for $42,761.12, payable to itself. This check was signed by Officers of Joint Company as follows: By Eric Ekstrom, President, and A. E. Gustafson, Secretary-Treasurer, and, on the back, was endorsed by the Joint Company to Third National Bank of Rockford. (R. 133.) This check was mailed to Third National Bank of Rockford on June 12, 1931, together with a deposit slip directing the Third National Bank to deposit the amount of same to the credit of the Joint Company with said Bank. (Plaintiff's Exhibit 2, R. 122.) This check was received by the Third National Bank in due course of mail and was presented by it for payment, through the Rockford Clearing House, on Saturday, June 13, in the morning clearings of that date (R. 38), and the same was paid and honored by the Manufacturers National Bank on presentation. It is because of this payment that the present suit was brought to declare the payment void, either because of R. S. 5242, or as a void and fraudulent preference at common law, and to recover back the amount of said payment.

The Manufacturers National Bank remained open for business during the whole banking day of June 13, 1931 and during that day, and at all times previous thereto, it met and honored every demand made upon it and took and received every deposit tendered to it (Finding 23, R. 192) and was able to and did meet all its obligations as they matured.

On Thursday, June 11, 1931, one Floberg, the President of the Rockford Clearing House, who also happened to be President of the Manufacturers National Bank, had received notice from the President of the Security National Bank that the *latter* Bank likely might not be able to meet its clearings, and Floberg, as President of the Clearing

House, had conveyed this information to the National Bank Examiner at Chicago, and had received word from the Examiner that the Examiner would immediately proceed to Rockford, which he did, arriving there on the morning of June 12. The Examiner first went to the Security Bank and made tentative arrangements by which the Swedish American Bank would take over the Security Bank, subject to an appraisal of assets of the latter Bank, and had secured a contract for said take-over, subject to said apprisal, signed by both Banks involved. (R. 38-39.) About eleven o'clock in the morning of June 12, the Examiner (Baty) attended a meeting of the Directors of the Manufacturers Bank, which he had requested the President of the Bank to call. and at said meeting Ekstrom, a Director of the Bank, who was also President of the Joint Company, was present.

The Examiner at this meeting briefly discussed the banking situation, told of the situation in which the Security Bank found itself, stated he had arranged for a take-over of the Security Bank by the Swedish American Bank and stated that this situation, whether the take-over was effected or not, in his opinion, would cause uneasiness and a critical Bank situation in Rockford the following Monday, and expressed his opinion that the situation would result in a run on all Banks in Rockford on the following Monday; and further stated it as his opinion that the anticipated run would be so severe that the Manufacturers Bank could not withstand it, on account of its low cash reserves, and he suggested to the Directors that "it would be for the best interests of the banking situation for their Bank to try and arrange some place to take their deposit liability under cover". He outlined to them that there were four National Banks on the east side of the river in Rockford and that with two National Banks on the east side the banking position would be much better. The Directors ex-

pressed the opinion they could stand any kind of a run that developed. The Examiner stated their cash reserves were entirely too low for the Bank to weather any continued drain of deposits and it was his opinion, and the opinion of the Chief Examiner, that they would require far greater cash reserves. (See R. 39-40.) Baty requested the Directors to give him authority to discuss the affairs of the Bank with some other Bank in Rockford in order that he might negotiate a merger with some other Bank (R. 60) and encouraged the Directors in the belief that he could be of a good deal of assistance to effect a merger provided he was given authority to approach some one whom he had in mind. (R. 113.) As a result of the importunities of the Examiner at this meeting, the Directors of the Manufacturers Bank authorized Baty to discuss a possible merger of said Bank with any Bank in Rockford. Committees were appointed by the Manufacturers Bank to meet with a Committee of the Bank with whom Baty was to negotiate to effectuate the proposed merger.

This conference between the Bank Examiner Baty and the Directors of the Manufacturers National Bank terminated about noon on Friday, June 12, 1931, and after that meeting the Bank continued to function in its ordinary way for the balance of that banking day, June 12, and all of the banking day of June 13, during which days it committed no act of insolvency; it met, in due course, all of its obligations as they matured, received all deposits which were tendered to it and in every respect conducted its business as a solvent, going Bank. When it closed at the end of the day's business on Saturday, June 13, it closed with the expectation on the part of all its managing officers that it would reopen for business the following Monday, as usual. It was faced with no matured obligation that it was unable to meet. It closed on Saturday at the conclusion of the day's business with approximately a half million dollars in

cash, or its equivalent, in its vaults, or on deposit in other Banks. (R. 44. See also Defendant's Exhibit 5, R. 171.) This consisted of

Cash	$253,240.06
On deposit, Federal Reserve	220,181.21
On deposit in other Banks	12,435.94

At the time the payment in question was made, not a single one of its managing officers contemplated the commission of an act of insolvency or contemplated the closing of the Bank. After the Bank closed for its day's business on Saturday, which was after the payment of the check in question, a meeting was held between a Committee from the Third National Bank of Rockford and a Committee from the Manufacturers National Bank, which had been arranged by Examiner Baty, for the purpose of appraising the assets of the Manufacturers National Bank, as a part of the negotiations for the merger which the Bank Examiner was endeavoring to effectuate. This meeting between the Committees from the two Banks convened at seven o'clock in the evening of June 13, at the Manufacturers National Bank, after the Bank had closed its business for that day, and after the check in question had been paid, and continued in session until the following morning. No conclusion was arrived at as to the merger at that meeting. Nothing was done at that meeting except to go over the assets of the Manufacturers National Bank and there was some discussion as to the value of some of the assets, but no conclusion was reached as to the value of any of the assets. (See testimony of Achor, R. 61-62.) On Sunday night, June 14, the Directors of the manufacturers National Bank were called together, and at that time the Directors were advised by Examiner Baty and Chief Bank Examiner Leyburn, that the Third National Bank of Rockford would not consider the proposed merger unless the Directors of the Manufacturers National Bank would turn over to the Third

National Bank *certain specified assets* (R. 62) of the Manufacturers National Bank, and in addition thereto, would pay to the Third National Bank $750,000.00 in cash, and that this payment would have to be made before Bank opening time on Monday morning, June 15. The Examiner further stated that he knew it was impossible for the Directors of the Manufacturers Bank to comply with the demands of the Third National Bank within the time specified, and he demanded that the Directors of the Manufacturers National Bank adopt the following resolution (Plaintiff's Exhibit 6, R. 126):

> "That due to frozen and non-liquid assets, it is the opinion of the members of this Board convened that the interest of the depositors of this Bank can best be preserved by suspending business and placing the affairs of this Bank in the hands of the Comptroller of the Currency: Now, therefore: BE IT HEREBY RESOLVED, that the business of this Bank be suspended and placed in the hands of the Comptroller of the Currency."

The Bank Directors protested that the Bank was not insolvent and at first refused to adopt the resolution which the Examiner had already prepared previous to the meeting, but under threat of prosecution by the Comptroller, of the Directors, if they kept their Bank open and received deposits, the Directors reluctantly passed the resolution, which is found in the Record at Page 126, after the same was somewhat modified. (See also R. 104.)

There is no question but that the first time the Directors of the Manufacturers Bank or any of its Officers knew that the Bank would not resume business on Monday, June 15, was at the meeting on Sunday evening, June 14, and this was approximately thirty-six (36) hours after the payment of the check in question.

The Record contains no proof that prior to the payment of the check in question the Manufacturers National Bank had committed any act of insolvency, nor that its Officers

contemplated the commission of an act of insolvency, and neither the District Court nor the Court of Appeals found that any act of insolvency had been committed, or was contemplated by any of the Officers of said Bank at the time of the payment of said check. The theory upon which the decree was rendered, and sustained by the Court of Appeals, as we understand it, is that although the Manufacturers Bank was keeping open and doing business in the regular way and holding itself out thereby to be a solvent, going institution on June 12 and 13, yet, its condition was, in fact, precarious, and the Bank's Officers *should have known* that the Bank was insolvent at the time the check in question was paid by it, and because *they should have known it*, it will be presumed that they paid the check in question "with a view" of preferring the Joint Company, or of preventing the application of the Bank's assets as provided by the National Banking Act.

The evidence offered, as to the condition of the Bank prior to the payment in question, is contained in Exhibits 22, 24 and 25 (R. 242-254), which exhibits consist of an Examiner's report of the condition of the Bank as of December 4, 1930, and a letter from the Comptroller to the Directors of the Manufacturers National Bank under date of January 8, 1931; also of a letter from the Comptroller of the Currency under date of May 28, 1931 to said Directors, enclosing a report of examination of the condition of the Manufacturers Bank as of May 1, 1931. In the report of the examination made to the Comptroller by the Examiers in charge, it was *estimated*, in the December examination, by the Examiner, that the Bank had sustained losses of $162,877.12, and that losses probable, but not estimated, were $462,105.64, and the Examiner *estimated* that there was slow paper amounting to $1,036,102.10. In said report, also, the Examiner expressed the opinion that 48% of bills receivable were subject to criticism, and that fur-

ther losses were inevitable, and that Directors were borrowing for themselves and their companies in excess of the Bank's invested capital. In the recapitulation of the examination of May 1, the Examiner made similar expressions of *opinion* as to the losses, and doubtful and slow assets, and also expressed the opinion that over 50% of all loans were subject to criticism and heavy losses were in prospect; also, that Directors' borrowings were still in excess of invested capital and that heavy losses on these loans were inevitable. In the letters from the Comptroller to the Directors the attention of the Directors was called to the Examiner's *opinions* as to the assets. An objection was interposed by the Defendants to the introduction of these Exhibits 22, 24 and 25, which will be hereafter argued in this Brief, and, if there was any proof in the Record that shows that the Bank was in an insolvent condition in the sense that its assets were less than its liabilities, that proof is only shown by these exhibits, and there was no other proof of any kind or character showing that the Bank was insolvent in the sense that its liabilities exceeded its assets, and no proof of any kind was offered showing that the Bank was insolvent in the sense that it was unable to meet its obligations as they matured.

V.

The errors to be argued are as follows:

The decree below should be reversed because

(a) As appears from the Record a decree should have been entered herein in favor of Defendants (Respondents) on the Bill of Complaint, and in favor of Defendant, Joint Company (Respondent), on its counterclaim.

(b) As appears from the Record, the Court below erroneously held that the withdrawal by the Mechanics Uni-

versal Joint Company of the sum of $42,761.12 from the Manufacturers National Bank and Trust Company on June 13, 1931 was void because of R. S. 5242.

(c) As appears from the Record the Court below erroneously held that the withdrawal by the Mechanics Universal Joint Company of the sum of $42,761.12 from the Manufacturers National Bank and Trust Company on June 13, 1931 was void and fraudulent, notwithstanding the withdrawal was not inhibited by R. S. 5242.

(d) The Complaint improperly joined a statutory action against the recipient of a payment alleged to have been made void by R. S. 5242, with an asserted common law or equitable cause of action against a Director.

(e) As appears from the Record, the Court below erred in admitting Plaintiff's Exhibits 22, 24 and 25, respectively, and in considering the same and in basing its decree thereon.

(f) As appears from the Record the Court erred in dismissing the counterclaim of Defendants and in not awarding relief to Defendants, Mechanics Universal Joint Company, thereunder.

(g) The decree erroneously awarded a judgment against Eric S. Ekstrom, Defendant, who had no interest in the payment, had no right or title to it and who did not receive it or any part of it.

(h) That the decree and judgment is contrary to the law.

(i) That the decree and judgment is contrary to the evidence.

VI.

ARGUMENT.

As petitioners view this case, there are but two major questions involved in it. They are

(A) Does R. S. 5242 have any application to the facts in this case, *i. e.,* does the Record show that the conditions, enumerated in R. S. 5242, which make a payment by a Bank to its *bona fide* creditor void, existed in this case?

(B) If the Statute (R. S. 5242) has no application, was it a fraud at common law for a Corporation (Bank) to prefer one *bona fide* creditor (depositor) over others, when the preference was effected at a time when the Corporation was carrying on the business for which it was organized, and before its assets were *in custodia legis,* but at a time when its Officers and Directors knew or should have known that the Bank was insolvent, and that closing was imminent?

The other questions involved are merely incidental. They are as follows:

(C) Was it permissible for Plaintiff, in the Court below, to join in one cause of action in equity a Complaint against a depositor for receiving a payment of money alleged to be void under R. S. 5242, and in the same action to seek to recover from a Director of the Bank for an alleged violation of a common law duty?

(D) The Court erred in admitting and considering the Plaintiff's Exhibits 22, 24 and 25. (R. 242-254.)

(a) They were inadmissible;

(b) They did not prove any material fact in the case.

(E) The Court erred in dismissing the counterclaim.

(F) The Court erred in decreeing a money judgment against Ekstrom.

We shall argue these questions in the order and under the headings and numbers above indicated.

(A)

DOES R. S. 5242 HAVE ANY APPLICATION TO THE FACTS IN THIS CASE, I. E., DOES THE RECORD SHOW THAT THE CONDITIONS, ENUMERATED IN R. S. 5242, WHICH DECLARES A PAYMENT MADE BY A BANK TO ONE OF ITS BONA FIDE CREDITORS VOID, EXISTED IN THIS CASE?

R. S. 5242 (12 U. S. C. A. Sec. 91) is as follows, but as only a portion thereof is of any application to the facts in this case, we take the liberty of italicizing such parts only of the Statute as it can be claimed is pertinent to this inquiry, and for the purpose of analysis we attach a letter to each clause thereof to which we will hereafter refer:

> (A) "All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors;" (B) *"and all payments of money to either, made"* (a) *"after the commission of an act of insolvency, or"* (b) *"in contemplation thereof, made with a view"* (c) *"to prevent the application of its assets in the manner prescribed by this chapter, or"* (d) *"with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void;"* (C) "and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any State, County, or Municipal Court."

In this case there can be no contention that any other portion of the Section above quoted, except that portion italicized and including Clause "B" and subdivisions (a), (b), (c) and (d), have any application, because in the case at bar, the only transaction between the Bank and its depositor (the Joint Company), referred to either in the pleadings or proof, was a *payment of money* by way of the honoring of a check drawn by the depositor on the Bank. No notes or securities or mortgages were assigned or bullion or other valuable things deposited for the use of petitioners, or either of them.

A *payment of money,* amounting to $42,761.12, *was made by the Bank* on the morning of June 13, 1931 to the Third National Bank of Rockford through the Rockford Clearing House. This payment was made to honor a written order or check of the Joint Company drawn on the Manufacturers Bank, payable to the order of the Joint Company and endorsed and delivered by it to the Third National Bank of Rockford, Illinois (R. 133), and the payment was made at a time when the Joint Company had a balance on deposit, to its checking account in the Manufacturers Bank, of $63,224.30, a large portion of which had been deposited a few days prior to this payment. This was the only transaction attacked by the Plaintiff by his pleadings, or proof, so that we can start out upon the undisputed premise that the transaction claimed to have been void, was a *payment of money,* and that such *payment* is inhibited, if at all, in only that portion of the Statute above italicized and designated "B". Congress did not, by said Statute, make *every* payment by a Bank to its depositor, void, and as the whole scheme of the National Banking Act implies that a depositor in a National Bank shall be free to withdraw his deposit, or any part thereof, on demand, it is fair to assume that Congress had no intention of declaring any payment of money to a depositor by a Bank, void, except in

those instances, and under those conditions, expressly stated in the Statute. It is our contention that Congress carefully and advisedly attempted to specify the conditions under which payment by a Bank to its depositor would be void. It has always been supposed that the relation between a Bank and its depositor was a relation analogous to that of debtor and creditor, and that the contract implied by law, upon a commercial deposit being made, was that the Bank would pay its depositor, on demand, all, or any portion, of his deposit that he demanded; and that the usual payment by a Bank to its depositor, on the latter's demand, was a valid and lawful performance, by a Bank, of its contractual obligation, and that the payment, once made, was a final act, which, to the extent of the payment, satisfied and completed the contract, and lawfully reduced the deposit by the amount of the payment.

American B. & T. Co. v. *Federal Reserve*, 256 U. S. 350 (358).

We do not deny the right of Congress to provide, in its National Banking Law, that a payment made under *unusual* circumstances, or at *unusual* times, may be void, but we vigorously contend that if Congress sees fit to enumerate the unusual circumstances, or specify the unusual times in which a payment by a Bank to its depositor should be void, that its enumeration of the circumstances and times, in such an act, should be held by a Court to be the only circumstances or the only times, which would void the payment; that for a Court to extend or amplify the Statute and make it apply to circumstances or times not expressly specified in the act, would amount to a judicial usurpation of legislative power. Surely if a payment, made in performance of a solemn contract, is lawful under some circumstances, and unlawful or void under others, because of an inhibiting Statute, the circumstances under which the payment would

be void should be so specifically stated in the Statute that there can be no uncertainty about it. And we claim that Congress has, by carefully chosen language, been specific in its enumeration of the circumstances which will void such payments, and we further contend that the undisputed facts in this case, as found by the Chancellor and conceded by the Circuit Court of Appeals, do not show a payment made under the circumstances enumerated by Congress in Section 5242, which would render the payment void.

Let us then examine the *act* in question and attempt an analysis of it to determine just what *payments* made by a Bank to a depositor are therein declared to be void. Clause "B" does not make *all payments* of money by a Bank to its shareholders or depositors void, but only those payments made

(a) "after the commission of an act of insolvency", or

(b) "in contemplation thereof",

and only then, if the payment is made with the *intent* provided in Sub-sections (c) or (d) of said Clause "B".

The proof in this Record is undisputed that at the time the payment in question was made, the Manufacturers Bank had committed no act of insolvency. The District Court expressly so found (Finding 24, R. 193) and the Circuit Court of Appeals confirmed that Finding, and the pleadings in this cause do not charge, and, so far as we know, Respondent has never claimed, that the Bank had committed *an act* of insolvency prior to the payment, so Clause (a) of the Statute may be eliminated from consideration.

Was then the payment made "in contemplation of" an act of insolvency, as described in Clause (b) of the Statute? There is no proof in this Record that the payment made by the Bank was made by its Officers "in contemplation of

an act of insolvency", or "in contemplation of insolvency", whichever is the proper construction of the Statute. Neither the District Court nor the Court of Appeals found that there was any such proof, but both seem to hold that such proof was not necessary. It was enough, they hold, that the Bank subsequently became insolvent, and they both hold that, as the Bank was in substantially the same situation, at the time of the payment, as it was when closed by the Comptroller, *it will be presumed* that the Officers and Directors of the Bank *should have known* that the Bank was insolvent, and that closing was imminent. This, we claim, is the error which renders the decision below unsound and at variance with the opinions of this Court.

In the first place, the Bank was not in substantially the same condition when it was closed by the Comptroller as it was when the payment was made, for, when the payment was made its doors were open, it was functioning as a Bank, and was able to and did meet all demands made upon it, and no action had been taken by its Officers admitting its inability to continue in business. When the Comptroller closed the Bank, it was a closed institution, suspended by a resolution of its Directors adopted nearly thirty-six (36) hours after the payment in question had been made, and which resolution was adopted because another Bank in the City had failed, and negotiations for augmenting the credit of the Manufacturers Bank, which were pending when the payment was made, had been unsuccessful.

Under the Statute, as we read it, a payment of money by a Bank to its depositor, if not made *after* an act of insolvency, is only void if made "in contemplation thereof", *i. e.*, "in contemplation of *an act* of insolvency". The Courts below have construed this clause as though it read "in contemplation of insolvency". This construction not only does violence to the syntactical arrangement of the

clause and its relation to the preceding clause, but is a construction in conflict with the meaning this Court has given to the act in *McDonald* v. *Chemical National Bank,* 174 U. S. 610. National Banks are not required to be solvent in the sense that their assets exceed their liabilities in order to conduct their valid business. If this were true, then all payments made by any Bank to a depositor, at a time when its solvency was questionable, would be void. But Congress did not see fit to so declare. We presume there are few Banks which, in the period of their business life, have not, at times, been contemplating insolvency in the above sense. Certainly Banks, no matter how conservatively managed, do go through periods of depression and the value of their securities shrink because thereof. A Bank, in times of depression, always finds itself with frozen assets, with depleted security for its investments, and it frequently is impossible for its Officers to know the exact value of its assets if they must be suddenly liquidated. In such times, all honest Officers of such Banks, who have knowledge of its condition, do "contemplate", in the sense that they "look forward to", or "are concerned" as to, *insolvency.* If they are honest Officers, they are confronted with the problem, under such circumstances, of struggling to keep their Bank open and going, or of hoisting the white flag of surrender. We make bold to say that every Bank has gone through such a period, if it has been in business over a span of years, at some time in its existence. If there was a Bank in this great country during 1931, which did not have assets in its portfolio which were criticized by the Comptroller, it was the exception. If there was a Bank at that period whose Officers were sure it was solvent in the sense that its assets, at their then value, were in excess of its liabilities, such Bank was a rarity. To place a construction upon this Statute which would have the effect of determining that every payment made by a Bank to its

depositors is void when the officials of the Bank are *concerned* as to whether its assets exceed its liabilities, would require every Bank to close whenever a substantial portion of its assets became slow or frozen. Such a construction would play havoc with the depositors and the Statute would do more damage than benefit to the persons it was designed to protect, namely, depositors. In the construction of a Statute, the Court always searches for the purpose of the legislature in enacting the law, and will so construe it as to give effect to that purpose, if possible. The purpose Congress had, in enacting R. S. 5242, manifestly was the protection of depositors, and to secure depositors in Banks which had committed an act of insolvency, or whose Officers were contemplating such an act, a pro rata distribution of the assets of said Bank. The object or purpose which Congress had in enacting the Statute would not be carried out if such a construction of the act is given as would require the Officers of the Bank, when they became concerned as to its solvency, to immediately close the Bank for liquidation, without making a struggle to keep the Bank open until the emergency had passed.

On the other hand, if Clause "b" "or in contemplation thereof" be given its ordinary grammatical interpretation, it will be construed as though it read "or in contemplation of *an act* of insolvency".

The term "act of insolvency" is not a term frequently met with in legal literature, and in using the term in the Statute in question, Congress was legislating concerning but one class of debtors—Banks—and was defining an act which would avoid what would otherwise be a perfectly lawful transaction between a Bank and its depositor. So far as we can discover, there has been but one attempt by a Federal Court to define the precise meaning of the term as used in this particular act. In *Hayden* v. *Chemical National Bank*, 84 Fed. 874, at Page 876, the Circuit Court

of Appeals of the Second Circuit, speaking through Justice Wallace, says:

> "An act of insolvency takes place when a business concern or a Bank has failed to pay some of its obligations, made an assignment for the benefit of its creditors, suspended business, or done any of those things which indicate to creditors that a debtor has become insolvent."

The above case was approved by this Court without, however, a construction by this Court of the term "an act of insolvency", in the case of *McDonald* v. *Chemical National Bank*, 174 U. S. 610.

Now, the evidence in this case, as found in the findings of the Courts below, conclusively shows that the Bank had committed no act of insolvency prior to the payment. What act of insolvency did it *contemplate* when the payment was made? Neither of the Courts below have attempted to point out what act of insolvency was contemplated, and neither seem to regard the Clause of the Statute as meaning more than a *realization* by its Officers that the Bank, in the near future, might be called upon to meet an unprecedented run, which a Bank Examiner feared it would not be able to withstand. Is it an "act of insolvency" on the part of a Bank for a Bank Examiner to express an opinion to its Board of Directors that, in his opinion, banking conditions in the City are such that the Bank will shortly be faced with a run of such proportions that the Bank will be unable to meet its demands, and to request the Directors to permit him to negotiate a merger with another Bank in a more liquid position? We believe the answer must be in the negative. Can it be said that a *payment* to a *bona fide* depositor, after such an expression of opinion has been made by an Examiner to the Directors, is "*a payment made in* contemplation of an act of insolvency"? The Courts below seem to indicate that

they entertain no such notion, but, they reason that, when consideration is given to the fact that for six (6) months prior to this expression of opinion by the Examiner, the Comptroller had on two occasions criticized some of the assets of the Bank, that these facts make it clear that the payment was made in contemplation of an act of insolvency. Judge Sparks, in the opinion of the Circuit Court of Appeals below, uses this language (R. 236):

> "It may be true that none of the Officers thought it was insolvent, or contemplated an act of insolvency or the closing of the Bank, but in view of the condition disclosed, and the reports and correspondence from the Comptroller, together with the advise and suggestion of the Examiner, we are convinced that the Officers and Directors *should have known* that the Bank was insolvent and that closing was imminent." (Italics ours.)

We respectfully submit that the above quoted conclusion goes beyond the Statute. The Statute does not say that a payment, made when the Officers and Directors "should have known that the Bank was insolvent and that closing was imminent", is void. To add that condition to the act of Congress, is to add a condition to invalidate a payment, which Congress did not see fit to write into the law. No Department of Government but Congress has the power to declare what acts will invalidate such a payment by a National Bank to its depositor. Congress carefully chose the words to define the conditions under which such a payment would be invalid. The facts in this case admittedly do not bring the payment within the prescribed condition. Here the Bank, when the payment was made, was open for business, was able to and did meet all demands made upon it as they were presented (R. 192. Finding 23). It closed its doors on Saturday for the banking day, with approximately a half million dollars in cash, or its equivalent, to meet the prophesied run the following

Monday. At the time the payment was made, all its Officers believed the Bank solvent. (See testimony of Floberg, R. 113; Olson, R. 109-110; Ekstrom, R. 105.) No decision had been then made to close the Bank. No such closing had been contemplated or suggested by any of its Directors or Officers, or by the Examiner or Comptroller. It is true, negotiations had been authorized, *at the request of the Examiner,* looking toward a merger with another Bank, but those negotiations had not progressed, even to a point of a meeting of the parties, at the time the payment was made. But the negotiations were authorized, not because of any critical condition of the Manufacturers Bank, but because *banking conditions* in Rockford were deemed by the Examiner to be critical. This critical condition of banking conditions had not been brought about or caused by any change in the condition of the Manufacturers Bank, but because another Bank (Security Bank) was embarrassed and would likely close or be taken over. This, in the opinion of the Examiner, would cause uneasiness among depositors of Banks in the City, and this was the reason, and only reason, the Examiner suggested (that because of the low cash reserves of the Manufacturers Bank that it might not survive the run he predicted), he desired authority to negotiate a merger with another Bank. There is no proof that the cash position of the Manufacturers Bank was any *lower* on the day he addressed the Directors than it had been for six months previous thereto. It appears from Exhibit 22, that on December 4, 1930 the Bank's cash position, as indicated by its cash on hand, on deposit in the Federal Reserve, and on deposits in other Banks, equaled $352,775.45 (R. 245). The same items shown as of May 1, 1931 equaled $379,555.48 (R. 251), while the cash position as disclosed by the same items on June 12, 1931 (the day of the Directors' meeting) equaled $485,837.21 (Defendant's Ex. 5,

R. 171). Thus the cash position of the Bank was *higher* by over one hundred thousand dollars than it had been for six months prior to meeting of June 12, and there was no *change* in its cash position which caused the Examiner apprehension, but it was that he considered the cash position too low (even though more than it had been for six months), to withstand a protracted run, which he did not *know* but only *predicted* would happen. And his prediction of a run was based, not on any condition of the Manufacturers Bank which caused uneasiness among the depositors of Rockford, but on the fact that it would become public that the Security Bank was in distress. The Bank was kept open for the purpose of its regular and usual business, and a part of its regular and usual business was not only the acceptance of deposits, but also the payment to depositors of their demands, and to meet and pay such checks as were presented through the Clearing House. This check of the Joint Company was presented to the Bank through the Clearing House on the morning of June 13, in the regular course of business, together with other checks of other depositors, and, in the regular course of business, and in the usual and ordinary course of the Bank's clearings, was paid. The payment of the check through the clearings by the Bank's Officers was not *actuated* by the knowledge its Officers had of its condition any more than the payment of the checks of other depositors, either over the counter or through the Clearing House, was actuated. Whatever the knowledge of the Directors or Officers of the Bank as to its condition, the payment of this check was not made "in contemplation" of such knowledge. It was made in the usual, ordinary way, in the ordinary course of the Bank's business. It was legally incumbent upon the Bank, so long as it kept its doors open, to honor and pay the checks of all its depositors which were presented for payment. It performed

this obligation fully and completely. So far as the Record in this case disclosed, this Bank preferred no depositor. It treated them all with equality. It kept its doors open and held itself in readiness to pay every depositor on demand, and it was able to, and did, meet the demands of every depositor so long as the Bank was open. And it kept open the whole of the banking day of Saturday, June 13. It closed its doors at the end of that day with the expectation on the part of all its Officers and Directors to open for business on Monday morning following. Its determination to close its doors did not take place until Sunday evening, June 14, and this determination was not caused or actuated by any knowledge as to the condition of the Bank the Officers of the Bank had prior to or at the time of the payment of the check in question, but because of a series of events which occurred on Sunday, namely, the announced failure of the Security National Bank; the failure of the negotiations the Bank Examiner was conducting to effect a merger of the Manufacturers Bank with the Third National Bank, and the sudden and persistent demand, *never before made,* by the Bank Examiner, for a resolution to turn the Bank over to the Comptroller for liquidation. This resolution, at that time (Sunday evening) was reluctantly voted by the Directors, who acted, more or less under coercion, and yielded only after threats, by the Examiner, of prosecution, if they kept the Bank open. Every Director of the Bank, who was present at the meeting on Sunday evening, was of the opinion the Bank was solvent and so stated, and argued, to the Examiner (R. 104), but they could not withstand the threats of the Examiner. We do not criticize the wisdom of the Examiner, nor do we say that the Directors were unwise in voting the resolution to close, but we say that there can be no doubt, from this Record, but that the Directors and Officers of the Bank *honestly thought* that the Bank was

solvent and able to continue to perform its banking obligations even at the time they voted to turn the Bank over to the Comptroller. The Statute is aimed at a payment made "after an act of insolvency, *or in contemplation thereof*". How, we ask, could a payment made by Officers of the Bank, who honestly thought the Bank was solvent, and when no act of insolvency had occurred, be said to have been made "in contemplation of either insolvency or of an act of insolvency"?

"Contemplation", defined by Webster, denotes "purpose", or "intention". He defines the word as "an act of looking forward to an event as about to happen; act of intending, purposing or considering, hence intention, consideration, etc." Justice Wallace, in *Hayden* v. *Chemical National Bank*, 84 Fed. 876, in defining the meaning of the word as used in this Statute, says:

> "A Bank or business concern may be considered to be acting in contemplation of insolvency when, in making some disposition of its assets, it is *actuated* by its knowledge of its insolvency."

The Court of Appeals of the Seventh District, in its opinion filed in the case below, seems to voice the opinion that the words "in contemplation of" have the same meaning as "with knowledge of" and even goes to the extent of stating, in its opinion heretofore quoted, that if the Officers of the Bank "should have known" that the Bank was insolvent, or its closing imminent, that the payment was made "in contemplation of" insolvency. We earnestly insist that the condition of a payment made *in contemplation* of an event is not satisfied by proof of a payment made by Officers *who should have known*. The Circuit Court of Appeals, when this case was before it, seemed to follow the conclusion of law No. 4 found by the District Court, that is as follows (R. 193):

> "In view of the knowledge possessed by the Defendant, Eric S Ekstrom, which he had acquired be-

cause of his confidential connection with the Manufacturers National Bank, when he drew the check of the Defendant Corporation for $42,761.12, *it would be inequitable* to allow the Defendant Corporation to obtain the advantage which it would thereby obtain over other depositors by virtue of the knowledge which its President had acquired." (Italics ours.)

The District Court, however, did not find as a fact that the payment of the check in question was made by the Bank in contemplation of insolvency. Its findings of fact, numbers 23 and 24, were fully sustained by the evidence and are as follows (R. 192-193):

Finding Number 23:

"During the whole period from June 6, 1931 to June 13, 1931, both days included, said Manufacturers National Bank and Trust Company remained open during each banking day, and on each of said days transacted its usual and ordinary banking business, accepting such deposits as were tendered to it, and on each and every of said days paid all and every demand which were made upon it; that it honored every check drawn upon it by its respective depositors which was presented to it during said days, and paid all checks drawn upon it by its respective depositors which were presented through clearings with other Banks on said days, and during said period was able to and did meet all of its obligations as they matured."

Finding Number 24:

"The Court finds that the payment by the Manufacturers National Bank and Trust Company of Rockford, Illinois, of the sum of $42,761.12 upon check of the Defendant, Mechanics Universal Joint Company, against its checking account in said Bank, and the transfer of said sum to the account of said Mechanics Universal Joint Company in the Third National Bank of Rockford on June 13, 1931, was not after the commission of an act of insolvency by the Manufacturers National Bank and Trust Company of Rockford, Illinois; that prior to said payment and transfer the said Manufacturers National Bank and Trust Company of Rockford, Illinois, had committed no act of insolvency."

The whole theory upon which the District Court determined this case, as shown in Conclusion of Law Number 4 and upon which the Circuit Court of Appeals affirmed the decree as shown by the above quoted excerpt from its opinion, seems to be that although the Bank had been continuously open and doing business, with the knowledge of the Comptroller, since December 30 down to and including June 13, 1931, yet, that the Bank was, in fact, insolvent during that period, and such insolvency *should have been known* to its Officers, including Ekstrom, one of its Directors and that therefore the payment in question was void. This theory we earnestly contend not only is untenable, but is in conflict with the opinion of this Court as announced in *McDonald* v. *Chemical National Bank*, 174 U. S. 610. In that case, this Court held there could be no recovery and upon the very theory advanced by the Court below, states as follows:

> "Nor can a finding that the payments and remittances made to the Chemical National Bank on the dates above mentioned were made *in contemplation of* insolvency and *with an intent* to prefer that Bank be based on the mere allegation that the Capital National Bank was actually insolvent, *and that its insolvency must have been known to its Officers.* It is a matter of common knowledge that Banks and other Corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the Bank can be kept up by continuing its ordinary business and by avoiding any act of insolvency, events may take a favorable turn and thus suspensions of payments and of business be avoided." (Italics ours.)

This Record discloses no intent or purpose on the part

of any paying officer of the Bank to either prefer the Joint Company in the making of the payment, nor is there any indication that the payment was *actuated* by a contemplation of insolvency. In fact, none of the Officers of the Bank at the time the payment was made had the remotest idea that the Bank would shortly close its doors, or suspend business. All they knew was that the Comptroller of the Currency had criticized some of the Bank's assets and had been vigorous in his criticism of them, and that a Bank Examiner had voiced his opinion that a run on all the Banks of Rockford was impending, which, *in his opinion,* the Manufacturers Bank would be unable to withstand. The Officers and Directors of the Manufacturers Bank disagreed with the Examiner. They felt, and so advised the Examiner, that their Bank could stand any run that developed. (R. 39.) At the time this payment was made, there was not only the belief on the part of the Directors that the credit of the Bank would be maintained indefinitely, but they were led to believe *from representations made* by the Bank Examiner that he could likely effect a consolidation with a Bank which he had in mind, and the Bank was kept open, with the belief on the part of all its Officers and Directors that it was solvent and would be able to withstand any run of its depositors, without any thought of or contemplation of an immediate closing thereof.

The "purpose", the "intent", implied by the use of the words "in contemplation of", as used in the Statute, are what Congress made the element of voidability. A payment made, which is *actuated by a knowledge* of the closing of a Bank, is an entirely different sort of a payment from one made in regular course of business by a payor Bank "who should know" it is in bad condition and may be forced to close its doors. It is one thing to make a payment at a time when the Bank, in its regular course of busi-

ness, is paying *all* demands made upon it, in an honest effort to keep the Bank open until all hope of saving it is gone, and another thing entirely for a Bank to make a payment, *not* in the regular course of business, *not* during usual banking hours, when *it is known* the Bank will shortly close, or at a time when, if the ordinary demands are paid, the funds of the Bank will be exhausted, as are the facts in all the cases cited by Respondent. The latter payment would be void under the Statute, not because the payment was made at a time when the Bank's Officers "should have known of its insolvency", but because it was made by the Officers of the Bank "in contemplation of insolvency or an act thereof", and with an "intent" or "purpose" to treat one depositor more favorably than others.

As said by the Circuit Court of Appeals of the Fourth Circuit in *Rucker* v. *Kokrda,* 68 Fed. (2) 73, in discussing the facts of that case:

> "When the payment was made, the decision to close the doors on the following morning had not been reached. That decision was not arrived at until late that night. True, the Officers knew that unless new money was interested, or confidence restored, the Bank could not indefinitely meet its customers' demands; but when the payment was made, the Officers were hopeful the negotiations of the night would avert the necessity of an act of insolvency. This payment was, therefore, not made in contemplation of the later act of insolvency."

If that reasoning is sound, then it applies to the facts in this case, for in this case the facts are undisputed that when the payment in the case at bar was made (on Saturday morning, June 13), the decision to close the doors on the following Monday had not been reached, nor had it been discussed. That decision was not arrived at until Sunday evening and the decision was then reached, not because of any condition of the Bank known to the Officers at the time payment was made, but because of a demand

for such action, made the first time on Sunday evening by the Bank Examiner, and because of threats of prosecution of the Bank's Officers if the Bank was kept open. At the time the payment was made in this case, the Officers of the Bank were hopeful that a merger would be effected through the efforts of the Examiner, which it was thought would restore confidence in banking circles in Rockford and thus avert the threatened run which the Examiner, but not the Officers, thought would be disastrous.

But, even if the construction which we urge, of the meaning of the words of the Statute "or in contemplation thereof", be erroneous, and even if the condition prescribed by the Statute avoiding a payment made in contemplation of insolvency or an act thereof, is satisfied, as the Court of Appeals seems to hold, if made at a time when the Officers of the Bank "should have known that the Bank was insolvent and that closing was imminent", yet, the Statute does not make every payment void when made "after the commission of an act of insolvency, or in contemplation thereof". Congress has, by the Statute, imposed further conditions necessary to exist before the payment may be declared void; those conditions are imposed by the succeeding clauses of the Statute (c) or (d) which read:

(c) "Made with a view to prevent the application of its assets in a manner prescribed by this chapter."

(d) "Or with a view to the preference of one creditor to another."

The language of the Statute "made with a view" is synonymous with "made with an intent or purpose" to accomplish the object sought by Congress to be inhibited.

Both Courts below have ignored these clauses of the Statute—have decided this case as though these clauses (c) and (d) were not a part thereof. There can be no contention that there is any proof in this Record that any of the Officers of the Bank who managed it, or who were au-

thorized to make payments for it, had any intention or purpose to make an unlawful preference when the payment in question was made. The payment was made through the Clearing House of Rockford on June 13, 1931, not as a single item, but among a list of forty-four items or checks from the Third National Bank of Rockford, comprising a total of checks on the Manufacturers Bank, cleared from the Third National Bank on that day, of $53,604.22. (See Plaintiff's Exhibit 25, R. 125.) There is no proof in the Record of what checks, if any, drawn on the Third National Bank, had been presented through the Clearing House by the Manufacturers Bank which would off-set this $53,604.22 in the clearings, nor is there any proof that the clearings between the two Banks were balanced by a payment in cash by one Bank to the other. If the Manufacturers Bank, on that day's clearings, had presented checks it held which were drawn upon the Third National Bank, then, in the usual course of clearings a balance would have been struck and the difference paid in cash by the Bank holding the lesser amount of checks, to the one holding the larger. How this clearing was effected, whether by a payment in cash by the Manufacturers Bank to the Clearing House of $53,604.22, or whether, involved in the clearings, there was an off-set of checks, is not disclosed by the Record, but however it was effected, the point we make is that it was a clearing made in the usual way, and there are no circumstances to indicate that there was any *intent or purpose* on the part of any paying officer of the Manufacturers Bank to clear the check of the Joint Company any more than there was to clear any one of the other forty-three checks involved in the same clearing. There is no proof in the Record that the presence of the check in question in any way or manenr influenced the clearing of forty-four checks as one item. The clearing would have been effected

regardless of the presence of this check therein. There is no evidence that the clearing of the forty-four checks was influenced by knowledge on the part of the Bank or its Officers of the presence therein of the check of the Joint Company, or that the clearing was effected outside the regular and usual business of the Bank. The clearing was effected either by Mr. Kramer, the bookkeeper of the Manufacturers Bank, or by Mr. Conklin, the Cashier, and was testified to by Mr. Conklin (R. 37), a witness for Plaintiff, who testified concerning the transaction as follows:

> "Plaintiff's Exhibit 5 is a list of the clearings received from the Third National Bank by our Bank on June 13, 1931. That is the usual way in which clearings are exchanged, by having a list. It is a list made up by the Third National Bank in their Clearings Department as a list of checks that they had against our Bank to be exchanged through the clearings on June 13. All these items were checks that they had against the Bank on that morning. There is nothing on the list that would indicate the amount of checks our Bank had against the Third National Bank to be exchanged that morning. This list shows that the total of checks the Third National Bank had against the Manufacturers Bank on June 13 was $53,604.22. * * * In my opinion the item $42,761.12 indicates the same item as the figure $42,761.12 mentioned in Plaintiff's Exhibit 4."

We believe the above quoted testimony is the only proof in the Record concerning the clearings, on June 13, and we contend that this evidence, adduced by Plaintiff, disclosed that the transaction relative to the clearings, was, as the witness stated, conducted in the usual and ordinary way, and in exactly the same way as the other forty-three checks, of other depositors shown in Plaintiff's Exhibit 5, were cleared at the same time that the check in question was cleared.

A case very similar, on the facts, to the case at bar is *Hayden* v. *Chemical Bank*, 84 Fed. 861 (876), heretofore

cited. In holding a state of facts very similar to those in the case at bar insufficient to avoid a payment, that Court, speaking through Judge Wallace, said:

> "The Capital Bank had not committed an act of insolvency. Assuming that its managers knew that its liabilities greatly exceeded its resources, and that it would presently be unable to meet its obligations, and have to suspend, there is no evidence that the payment in question was influenced by that knowledge. A payment to a depositor, or other creditor, in the usual course of the Bank's business as a going concern, and not preparatory in any sense to the anticipated insolvency of the Bank, is not, we think, within the condemnation of the Statute. An act done by a Corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done in contemplation of insolvency."

Neither the District Court nor the Court of Appeals, in their consideration of the case at bar, were able to find, and neither found, that the payment in question either was influenced by the knowledge the Bank's Officers had of its asserted condition, or was made with a view, or intent, or purpose, on the part of the Officers of the Bank to (c) prevent the assets of the Bank from being applied in the manner prescribed by the Statute, or (d) prefer the Joint Company as a creditor, and they both intimate that such finding is not necessary, because, they argue, that Ekstrom must have had such an intent, and that Ekstrom was an Officer, namely, Director of the Bank.

Did Ekstrom's Intent or Purpose Comply With the Condition of the Statute and Render the Payment Void?

The condition imposed by the Statute is, that if the *payment is made* "with a view" either to "prevent the application of the assets" or "to prefer one creditor over another", the payment is avoided. Assuming the words "with a view" are to be construed to be synonymous with the word

"intent", or "purpose", or "motive", then the intent or purpose or motive must be in the mind of the Officer of the Bank who *makes, or directs, the payment.* The Statute cannot be logically construed as referring to the intent or purpose or motive of the one who receives the payment. If that was the intent of Congress, it would not have confined the voidability to the "payment" alone, but would have used the words "any payment *or receipt* of money" made under the circumstances enumerated, "is void", or would have used language indicating that the intent of the recipient of the payment should be an element governing the avoiding of it. But Congress used no such language in the Statute. Although Ekstrom was a Director of the Bank, he had nothing to do with the payment of this check. He was not a paying officer of the Bank. He was not an employee of the Bank, and had nothing to do with its management, aside from being a director. Neither did he receive payment of the check. The check was paid to the Third National Bank of Rockford in the clearings of that day.

The State of Michigan has a Section of its Banking Act which is identical with Section 5242 of the Federal Revised Statutes. This Statute is recited in the case of *Stone, Receiver,* v. *Jenison,* 111 Mich. 592, where Mr. Justice Hooker, in a concurring opinion, uses this language:

> "It seems to be agreed that the right of Plaintiff to recover must be based upon the fact that after the Bank has committed an act of insolvency, or when in contemplation thereof, the payment sought to be recovered back was made with a view to prevent the application of the assets in the manner prescribed by the Banking Act, or with a view to the preference of one creditor over another. We may reasonably say that the words 'with a view to' mean with the intent or design of pursuing a particular course, and that this intent or design means the intent of the Bank or Officers making the payment, and not the intent of the recipient of the payment."

Precisely the same conclusion was reached by the Circuit Court of Appeals of the Fourth Circuit in the case of *Lucas* v. *Federal Reserve Bank*, 59 Fed. (2) 617 in construction of R. S. 5242. In the Lucas case it appears that the Federal Reserve Bank, after it had made a loan on collateral security to the National Bank of New Bern, and after it, the Reserve Bank, had determined that the National Bank was insolvent, and its assets frozen and uncollectible, had demanded that the National Bank transfer to it, as additional security for its prior loan, $208,000.00 of additional collateral, which additional collateral the National Bank transferred to the Federal Reserve Bank, and it was claimed, in that suit, that this was a transfer of assets made by the National Bank in contemplation of insolvency, and with a view of granting a preference, and that the transfer was void by reason of R. S. 5242. The allegations of the Bill, as to the motive and intent of the transfer, were briefly recited in the opinion as follows:

> "That the Reserve Bank, by reason of its access to and examinations made of member Banks, had a more intimate knowledge of the condition of the assets of National Banks than their own Officers."

In other words, it was contended by the Bill of Complaint, in the *Lucas* case, that the transfer there in question was void, because of R. S. 5242, solely upon the ground that the intention of the *transferee* brought the payment within the condemnation of that Statute, notwithstanding there was no such intention on the part of the Officers of the Bank who participated in the transfer. As to this contention, in the Lucas case, p. 621, the Court said:

> "The purpose of the Statute was to guard against the wrongful or preferential disposition of the assets of a Bank by its Officers, in contemplation of insolvency; and the knowledge and intent which it requires for avoiding a transfer, relate to the knowledge and intent on the part of the Officers of the Bank, who alone have the power to make the transfer." (Citing cases.)

"As said by Judge Wallace in the case of *Armstrong* v. *Chemical National Bank, supra,* 'a Bank is not in contemplation of insolvency until the fact becomes reasonably apparent to its Officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations. On the other hand, if the Officers of the Bank make the transfer in contemplation of insolvency with a view of granting a preference, the transferee's knowledge, or want of knowledge, is immaterial' ". (Citing cases.) "*If the Officers have no such knowledge or intent, it manifestly cannot be condemned as preferential, whatever may be the knowledge or intent of the transferee.*" (Italics ours.)

The Courts below, in the case at bar, seem to reason that the intent of the Bank to make a preferential payment to the Joint Company can be *assumed* because the Directors of the Bank *should have known* that the Bank was insolvent and that closing was imminent, and because further that Ekstrom was a Director of the Bank, who, in common with the other Directors of the Bank, should have had such knowledge, and that Ekstrom signed his name as President of the Joint Company to the check of the Joint Company, which was paid by the Bank, and the payment was only effected because of an affirmative act of Ekstrom, or, in other words, the payment would not have been made had not Ekstrom signed the check for the Joint Company, but the fallacy of the argument is that, not only is there no proof that the signature of Ekstrom to the check was *necessary* to effect a withdrawal, but also that Ekstrom performed no act, in the whole transaction, *as Director of the Bank.* When he attached his name to the check, he did so as *President of the Joint Company,* not in his capacity as a Director of the Bank. As a Director of the Bank he could only act at a meeting of the Board of Directors (unless he was an agent duly authorized by a majority of the Board). From the time that meeting convened until the time it adjourned, if he was present, he is chargeable, as a Director,

with whatever act he participated in, but when the meeting was over, whatever he may have then done, was his individual act, and as a Director he could not be chargeable therewith nor could his act bind the Bank.

7 R. C. L. 439.

Even if we assume it to be true that Ekstrom, with knowledge of the Bank's imminent closing, acquired as a Director of the Bank, and for the purpose of assisting the Joint Company to effect a withdrawal of a part of its deposit before the Bank closed, signed a check for the Joint Company and directed its presentation for payment through the Clearing House, or otherwise, yet, whatever he did, was as agent of the *Joint Company* and not as an agent of the Bank. He took no part in the *payment*, which is the thing which is made void by the Statute. It is no answer to argue that a payment consists in the act of two parties; that a payment cannot be made unless contemporaneously with the payment there is an acceptance. The *payment* made with a certain *intent* on the part of the *payor* is what Congress has made void, and the intent on the part of the *payor* must exist or the condition of voidability imposed by the act is not violated. The Statute refers to "all payments *made*" at a certain time, "*made* with a view", etc., shall be null and void. The time of the *making* of the payment, as expressed by the words "*made* after an act of insolvency or in contemplation thereof", and the *intent* with which the payment is made, as expressed by the words "*made* with a view", indicate clearly, we think, that the participial word "*made*", in each instance, modifies the word "payment", and refers to the intent of the *one making the payment*. Congress was so specific about this that it indulged in needless repetition in the use of the word "made" in the Statute. While this may be tautology, it is strongly indicative that the repetition of the word "made", in the act, and its use both to prescribe the *time* and the

intent which must exist to render the payment null and void, was done deliberately by Congress in order to emphasize the modification of the preceding words "payment", and to make it doubly clear that, in order to invalidate a payment, the *payment* should be *made* at the time designated, and also be *made* with the intent prescribed. If, to be void, a *payment* must be *made* with a certain intent, the *intent* must relate to the *maker* of the payment, otherwise it is not *made* with the intent described. If the maker has not the intent, but the recipient of the payment has such *intent,* then while the payment may be *received* with such intent, it cannot be said that it is *made* with such intent. While it is true that a payment cannot be made unless, contemporaneously with the payment, there is an acceptance, this is true of most acts where two or more parties are involved. It is true of a "delivery", of a "demand", of a "gift" or of a "sale" and of numerous other transactions. In each of those instances the term is used to describe the act of only one of the parties to the transaction. Other terms are used to describe the act of the other party to it. The act of the party *receiving* a payment is the exact opposite of the act of the party who *makes* the payment. One act is passive, the other active. A payment is the act of one delivering a thing in satisfaction of a *debt,* the receipt of the payment is the act of one who is accepting the payment in satisfaction of a *credit* extended. Ekstrom was not an agent of the Bank to pay checks. No such authority had been conferred upon him and no such authority was vested in him as a Director. No action of the Board of Directors was taken authorizing the payment to the Joint Company of the check in question. The obligation on the part of the Bank to pay the check arose by reason of an implied contract between the Bank and its depositor, the Joint Company, to pay and honor the checks of the Joint Company on demand so long as the Bank kept open for the perform-

ance of its obligations. Ekstrom had nothing to do with this contract—at least the evidence does not show he had, and Ekstrom did no act *as a Director of the Bank* which aided or assisted the Bank in making the payment. Ekstrom, as a Director of the Bank, had no power to make a payment of its money on the demand of a depositor. Only the paying Officers or Agents of the Bank had such power. Ekstrom, as one Director of the Bank, could not keep the Bank open nor could he, alone, authorize or prohibit the Bank's paying officers from making or refusing to make payments. And it cannot be claimed that Ekstrom made any payment, or assisted in any way therein, nor did he receive the payment, which payment was received by the Third National Bank, not as Ekstrom's agent, but as agent of the Joint Company. All Ekstrom did was to sign the check of the Joint Company, together with Gustafson, the Assistant Secretary of the Joint Company the act of signing and presenting the check was the Corporate act of the Joint Company. Can it be said that the Joint Company was disqualified from withdrawing a part of its deposit while the Bank remained open, because Ekstrom, its President, had, in his capacity as a Director of the Bank, received information that the Bank was in danger of facing a run which might prove disastrous? Must the Joint Company, under such circumstances, stand by and see the Bank open and paying other depositors and refrain from withdrawing its money? Can a Director of a Bank penalize and disqualify every depositor from making a lawful withdrawal of his deposit, by notifying its depositors that the Bank is threatened with a run which may embarrass it? If the answer to the above interrogatories is in the affirmative, then the payment in question may be declared void—otherwise it sems to us it must be held valid. No decision of this, or any Federal

Court, has gone so far as to indicate the answer of the above questions should be in the affirmative.

We believe that when the depositors of a Bank gather around its doors to withdraw their deposits, in such numbers as to characterize the situation as a "run on the Bank", that each depositor has lost confidence in the stability of the Bank. Each is actuated by an intent to effect a preference. Each is making a withdrawal "with a view" to prefer himself and he gives little consideration to the rights of other depositors. Each hopes that he may reach the paying teller's window and get his money before the Bank closes. But is the validity of his withdrawal effected in any way by R. S. 5242 if he receives his money while the Bank is kept open, regardless of the motive or intent on the part of the paying Officers of the Bank? If so, then the invalidity of the withdrawal must be found in the *construction* of R. S. 5242, for not by any words used by Congress in the Section is there any intimation that the "intent", or "motive" of the depositor is to be weighed to determine the validity of the withdrawal. Congress said nothing about a *withdrawal*, nor did it attempt to make a withdrawal, under any circumstances, void. It did not provide that any payment was void "where the effect" would be a preference of one creditor over another. The only payment the act makes void is a *payment* of money, *made* to a stockholder, or creditor, after the commission of an act of insolvency, or in contemplation thereof, *made* with a view to prevent the application of its assets in the manner prescribed by the chapter, or with a view to the preference of one creditor over another.

An "Act of insolvency" could not only be committed by a Bank or its Officers. Never could it be committed by a stockholder or creditor. The phrase "in contemplation thereof" can only refer to the Bank or its Officers who made the payment. All the phrases of the Section are con-

nected together and refer to the Bank or its paying Officers. The payment to be void, must be *made* "in contemplation of", and "with a view to" and the "contemplation of" and the words "with the view to" must, if the sentence is analyzed by the elementary principles of syntax, be held to refer to the same antecedent, namely, the *payment* of money by the paying officers of the Bank or those who direct the payment.

This construction is now new to this Court. In *McDonald* v. *Chemical National Bank,* 174 U. S. 610, to which we have heretofore referred, the same contention was made that there could be a recovery under R. S. 5242, notwithstanding there was no proof that the payment had been made in contemplation of insolvency, or with the view to prefer one creditor over another. In considering this contention, this Court said (Page 618):

> "In the present instance, there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation *on the part of its Officers* to presently suspend business. It rather shows that, up to the last, the operations of the Bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that *those of its Officers* who knew of its real condition must have dreaded an ultimate catastrophe but there is nothing to justify the inference that the *particular payments in question* were made in contemplation of insolvency, or with a view to prefer the Defendant Bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed." (Italics ours.)

It is true that in the *McDonald* case there was no proof

that the Chemical National Bank had any notice or knowledge that the Capital National Bank, at the time of the payment, was in distress, aside from the fact that about a week previous to the payment the Chemical Bank had refused payment of a draft drawn on it by the Capital Bank, and it has been, and doubtless will be, claimed by Respondent that such fact distinguishes that case from the case at bar. This Court, however, in its opinion in the *McDonald* case, although reciting as a fact that the Chemical Bank appropriated the payments made by the Capital Bank innocently and without knowledge of the embarrassed condition of the Capital Bank, does not, in its reasoning, consider the validity of the payment in relation to any act or a knowledge of the payee—the payment was held by this Court to have been a valid payment because innocently made in the regular course of its business by the Capital Bank and because of the acts and knowledge of the payor.

The Court of Appeals in the case at bar uses this language (R. 237), referring to Ekstrom:

> "He was an Officer of the Mechanics Company as well as a Director of the Bank—hence it was not necessary for him to divulge any information to accomplish the *withdrawal* of the check."

There is nothing, however, in the Statute that provides that a *withdrawal* is avoided under any circumstances. The *payment* is what the Statute avoids, and the *payment* is only avoided if *made,* with a certain intent or purpose on the part of the payor. Nor was Ekstrom's signature to the check, in any way or manner, an act done by him as Director of the Bank.

If, because Ekstrom occupied the dual position of Director of the Bank and President of the Joint Company, it can, as a matter of law be held that the Joint Company was charged with knowledge of every fact that came to Ek-

strom's knowledge as Director of the Bank, and if this court indulges in the presumption that the Joint Company was *actuated* in making the withdrawal because of the knowledge which Ekstrom had, and which was chargeable to it because Ekstrom was its President, yet that is not what the Statute aims to make void. The *payment* was not made at an unusual time or in an unusual manner, nor was it made by the Bank preparatory in any sense to the anticipated insolvency of the Bank. Nor was any knowledge on the part of the Joint Company necessary "to accomplish the withdrawal of the check". The withdrawal was accomplished at a time when the Bank was paying the check of every depositor which was presented to it, and when it was able to do so. In no sense, therefore, can it be said that Ekstrom's *intent* or lack of intent was in any way material in this case, because nothing he did as a Director of the Bank, in any way influenced the paying officers of the Bank in making payment of the check.

If, as we have heretofore argued, the intent of the recipient of the payment is of no materiality, then it makes no difference whether Ekstrom intended to prefer the Joint Company in signing his name to the check, and to that extent assisting it in obtaining a withdrawal of its funds, because he did nothing, as Director of the Bank, to induce the Bank to pay the money, and the money was not paid to him. We respectfully submit that before it can be said that the Joint Company *intended* to obtain a preference, if that is material, we must know if Ekstrom directed the issuance of the check. Admittedly the check was not in Ekstrom's handwriting except his signature thereto. Admittedly it was not directed by him to be prepared. (R. 195.) It was prepared at the direction of the bookkeeper of the Joint Company who had charge of the deposits and withdrawals of the Company's money (W. H. Stark), and without any directions from Ekstrom or any other officer or employee

of the Company, (R. 89) and was written by Stark's Secretary, McGuire (R. 87-8-9) and was taken by McGuire to the office of the Assistant Secretary and of President Ekstrom for their signatures, as the executing officers of the Joint Company, at the direction of Stark, and it was taken up by McGuire after those officials had signed it and delivered by her to Stark, who, in turn, attached a deposit slip to it and handed it back to his secretary, who placed it in the mail. There is no proof whatever that Ekstrom's knowledge of the condition of the Bank had anything to do with the drawing, signing or presentation of this check. To draw such an inference, the direct testimony of Stark, Ekstrom and McGuire, to the contrary, must be ignored and this Court must indulge in speculation and conjecture against positive proof to the contrary.

There is nothing in this case except the fact that the check was presented for payment, soon after the Bank Examiner had advised the Directors of the Bank, including Ekstrom, that he anticipated a run on the Bank on Monday, which the Bank might not be able to withstand, that would arouse even a suspicion that the withdrawal was made because the Joint Company, or Ekstrom, intended to obtain a preference. All of Ekstrom's knowledge as to the condition of the Bank, which was conveyed to him by the report of the examinations of the Bank and the letters from the Comptroller, had come to him long prior to the withdrawal, and, in fact, anti-dates several large deposits aggregating more than the amount of this check which were made by the Joint Company in the Manufacturers Bank. There is no proof that Ekstrom had been advised by any managing officer of the Bank or the Examiner or by the Comptroller that the Bank had either committed an act of insolvency, or that it contemplated suspension, prior to the payment of the check, and in the absence of such information the Joint Company could rightfully withdraw any of

its deposit for any legitimate purpose it chose, so far as any inhibition in R. S. 5242 is concerned, and so long as the withdrawal was effected before the Bank had committed an act of insolvency or contemplated such an act. Even though, from the fact alone that the check was drawn and mailed on Friday, after the meeting of the Board of Directors, which had been addressed by Baty, the Examiner, a Court might be justified in holding that the presumption would be that the drawing of the check was actuated by the Joint Company because of the information which Ekstrom had received at this meeting, yet, Ekstrom did not receive any information at the meeting that the Bank was about to close. If Ekstrom had truthfully reported to his employer, the Joint Company, every fact that had been conveyed to him at the Directors' meeting, all he could have stated truthfully was that a Bank Examiner, in addressing the meeting, had expressed an opinion that banking conditions were such that a run on the Bank could be anticipated the following Monday, and further that *in the opinion* of the Bank Examiner, which opinion was not shared in by the managing officers of the Bank, that the cash reserves of the Bank were so low that it might not be able to withstand the predicted run. He would further have advised the Joint Company that, at the request of the Bank Examiner, authority had been given the Bank Examiner, by the Directors of the Bank, to arrange for a consolidation of the Manufacturers Bank with some other Bank in the City, for the purpose of bettering bank conditions in the City and restoring confidence in the public, and that the Bank Examiner held out hopes that such a consolidation would be effected through his influence. This is all that Ekstrom could honestly have stated. He could not have stated, and been within the truth, that the managing officers of the Bank were contemplating a cessation of its business, or, in the language of the Statute, that they were

"contemplating an act of insolvency. There is nothing in the reports of the Examiner, or the correspondence between the Comptroller and the Directors, in which there was any charge made that the Bank was insolvent, or that it was in such a condition that it could not long continue to function. If the Bank was insolvent, the Comptroller, by issuing his certificate of insolvency, regardless of any action of the Board of Directors or any officer of the Bank, could have appointed a Receiver and closed the Bank, and his finding that the Bank was insolvent would be binding, in the absence of fraud, (of which there is no claim made here), not only upon the world, but upon the Courts. But the Comptroller could not lawfully close the Bank, or appoint a Receiver, for any violation of the Banking Law, such as permitting excessive loans or of doing any act which forms a basis of the Comptroller's criticism of the assets of the Bank, without first obtaining a decree of a Federal Court that the banking law had been violated (R. S. 5239), in which case the Court, and not the Comptroller, would appoint a Receiver for the Bank. It is quite manifest from the letters of the Comptroller to the Directors of the Manufacturers Bank and from the action taken by the Comptroller's representatives on Sunday evening, June 14, that the Comptroller did not deem the Bank insolvent, and that he hesitated to issue his certificate closing the Bank by reason of its insolvency. He desired the Directors to assume the responsibility for closing the Bank, and he presented to the Directors, on Sunday evening, June 14, a resolution, not that the Bank was insolvent, but that the Bank suspend its operations and turn its affairs over to the Comptroller for liquidation because of "frozen and non-liquid assets". (R. 126.) We apprehend that the letters from the Comptroller to the Directors of the Bank were not written for the purpose of conveying information to the Bank that it was insolvent, but were written for the purpose of con-

ceying information to the Directors of certain violations of the National Banking Act, which the Comptroller claimed the Directors had suffered and permitted.

We therefore conclude this branch of the argument by again asserting that the payment in this case was not voided by R. S. 5242, because the proof in this case is conclusive

(a) that, at the time of the payment, no act of insolvency had been committed by the Bank;

(b) nor was an act of insolvency "contemplated" by any of its officers at the time of payment;

(c) nor was there any proof of an intention on the part of the Bank, or its officers, to prevent the application of the Bank's assets in the manner provided by the National Banking Act;

(d) nor was there any proof of an intention on the part of the Bank, or its officers, to prefer the Joint Company over any of its other creditors by the payment in question.

The contention of Respendont that Ekstrom's knowledge of the condition of the Bank and intent to effect a preference for his Company, was a knowledge and intent which is chargeable to the Bank because he was a Director thereof, has been fully considered and answered in the negative by the Court of Appeals of New York in the case of *O'Brien, Receiver* v. *East River Bridge Company*, 161 N. Y. 539, 48 L. R. A. 122.

In that case, a Statute of New York much more stringent than R. S. 5242, was involved. The Statute is recited in the opinion, and so much of it as is applicable is as follows:

"No conveyance, assignment or transfer of any property of any such corporation, by it or by any Officer, Director or Stockholder thereof, *nor any payment made*, judgment suffered, lien created or security given by it or by any Officer, Director or Stockholder when the corporation is insolvent, or its insolvency is immi-

nent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid."

In that case, as in the case at bar, the President of the depositing corporation (East River Bridge Company) was also a Director of the Bank (Madison Square Bank). In that case, such President had, as Director of the Bank, received information at a Directors' meeting that the Bank was insolvent, or in imminent danger of insolvency, and would suspend business the following day. The Director of the Bank also knew that another Bank (St. Nicholas Bank) had in its possession a large amount of securities belonging to the Bank of which he was a Director, and that it held such securities as collateral for any and all obligations as agent of the Madison Square Bank. He also knew that the St. Nicholas Bank had notified the Clearing House that it would cease to act for the Madison Square Bank, and that the St. Nicholas Bank, by the rules and regulations of the Clearing House, was responsible for all checks on the Madison Square Bank that would be presented at the Clearing House in the exchanges on the morning of the following day. *All this knowledge was acquired by said President of the East River Bridge Company in his capacity as a Director of the Madison Square Bank.*

With this knowledge, and knowing also that the East River Bridge Company was a large depositor in the Madison Square Bank, he immediately proceeded to the home of the Treasurer of the Bridge Company, and, at midnight of the day of the Director's meeting, had the Treasurer prepare and sign a check for the total amount of the deposit of the Bridge Company in the Madison Square Bank. *He as President of the Bridge Company, also signed the check.* Early in the morning of the next day, he took the check to the Hanover Bank and instructed the authorities in that Bank to have it presented at the Clearing House that morn-

ing, so that it might be paid by the St. Nicholas Bank in the exchanges of that morning, and thus be credited to the East River Bridge Company, and a withdrawal effected of so much of the funds and moneys or securities of the Madison Square Bank under the control of the St. Nicholas Bank. The Court of Appeals of New York there said:

> "There is no law that forbids a depositor in a Bank who is not an Officer or Director, from drawing a check against the deposit whenever the money is needed or even when it is thought the Bank is liable to fail. The act *by means of which the money was withdrawn in this case was a corporate act of the defendant, and not the individual act of the President.* The money on deposit belonged to the defendant and it was subject to check. The insistence that the defendant in its corporate capacity was induced to exercise its right by information of the condition of the Bank communicated by the President, who was also a Director of the Bank, *cannot change the case,* so long as the right to withdraw the money existed. The defendant cannot be compelled to restore the money simply because it made use of knowledge possessed by one of its own Officers. * * * The act by which the deposit was transferred from the failing Bank to the defendant was not, in any proper sense, the act of the Bank or any of its Officers. It was not a transfer prohibited by law. It is true one of the Bank's Directors participated in it, but not as such Director or as an individual, but as an Officer of the Defendant acting in its interest." (Italics ours.)

AS TO THE KNOWLEDGE OF EKSTROM BEING CONFIDENTIAL.

Respondent contended below, and no doubt will here contend, that the information which came to Ekstrom as a Director of the Bank, as to its condition, was information which was impressed with a confidence, and that for Ekstrom to have communicated these facts to a depositor was a breach of confidence of so grave a character as to amount to fraud. We disagree with Respondent. To maintain

such a contention it must be authoritatively stated, as a general legal proposition, that there is some law which requires a Director of an insolvent Bank, which is remaining open for business, or one about to become insolvent, to conceal the fact of insolvency from everyone. In the Code of Ethics which Respondent advocates, it seems to be entirely moral and legal for a Director of a Bank, knowing it to be insolvent, and knowing the Bank is to be kept open for the purpose of receiving deposits, and knowing that the keeping of the Bank open is an implied representation to the public that it is solvent, to keep his mouth sealed and conceal his knowledge from everyone. According to that Code, he must stand by and see his employer, or his best friend, or his closest relative, deposit money in the Bank, the very keeping open of which, if insolvent, is a fraud, and yet he may not speak the truth and prevent such depositor from being defrauded. Because he received his information at a Director's meeting, he may not speak the truth, for to do so would be a breach of confidence so sacred as to be protected by law. We know of no law which seals the lips of a Director of a corporation or creates a duty on his part to keep his knowledge a secret and thus assist in the perpetration of a fraud, for, if he spoke the truth to a prospective depositor, that information would immediately cause the prospective depositor to withdraw such deposits as he had in the Bank, as well as prevent him from making further deposits. It is the law of some States, founded on principles of equity and fairness which appeal to those Courts that adhere to the rule, that a Director of a corporation may not use the information he acquires as a Director, of the imminent failure of the corporation, *to enable himself* to prefer *himself* if he happens to be a creditor. As to this proposition, the State Courts of this country are in irreconcilable conflict. So far as we know, this Court has never exactly determined that proposition

In this case, Ekstrom did not use the knowledge he obtained to prefer himself. He was a depositor in the Manufacturers Bank to a substantial amount (Finding No. 9, R. 188). He drew out none of his personal deposits, nor did he attempt to. All that he can be criticized for is that he signed the check of his employer, which enabled his employer, the Joint Company, to withdraw a portion of its deposit at a time when the Bank was open and paying the demands of all depositors who presented their checks. As we will hereafter argue, if Ekstrom owed any duty to keep as confidential the information he received at a Directors' meeting of the bank, he did not owe that duty to the Plaintiff (who in this case sues as a representative of the creditors of the Bank) but he owed it alone to the Bank, which, so far as the facts in this case disclose, was in no way injured or damaged by Ekstrom's alleged breach of confidence.

(B)

IF THE STATUTE (R. S. 5242) HAS NO APPLICATION, WAS IT A FRAUD AT COMMON LAW FOR A CORPORATION (BANK) TO PREFER ONE BONA FIDE CREDITOR (DEPOSITOR) OVER OTHERS, WHEN THE PREFERENCE WAS EFFECTED AT A TIME WHEN THE CORPORATION WAS CARRYING ON THE BUSINESS FOR WHICH IT WAS ORGANIZED, AND BEFORE ITS ASSETS WERE IN CUSTODIA LEGIS, BUT AT A TIME WHEN ITS OFFICERS AND DIRECTORS KNEW OR SHOULD HAVE KNOWN THAT THE BANK WAS INSOLVENT AND ITS CLOSING WAS IMMINENT?

In the absence of a Statute there is no rule of common law or equity which prevents a Corporation from preferring a creditor simply because it is financially embarrassed. It has the same *jus disponendi* of its property that an individual or a partnership has. It has the same right to prefer a friendly creditor as an individual has.

In the determination of this case in the Circuit Court of Appeals, that Court disposed of the above contention against the petitioner herein, upon the intimation that there was something fraudulent or inequitable, or contrary to the common law in the fact that Ekstrom, a Director of the Bank, in effect advised the Joint Company, of which he was President, of the uncertain financial stability of the Manufacturers Bank and that this information instigated the Joint Company to withdraw a portion of its deposit in the Bank while the Bank was still open and pursuing its usual business. While the Court below cites no authority to sustain such a proposition and in fact does little more than intimate that there is such a principle of law, yet it, in effect, sustains the decree of the District Court by applying that principle. We earnestly insist that this principle is not sound, nor in accordance with the decided opinions of this Court.

It was argued by Respondent in the Court below, and is urged by it in this Court, that the payment of the check in question was void or unlawful, irrespective of R. S. 5242, because he claims the withdrawal of the amount represented by check in question was prompted by Ekstrom, who not only occupied the dual position of President of the Joint Company and Director of the Bank, but had acquired information at a meeting of the Directors of the Bank, which, it is claimed, was of such a character as to advise Ekstrom that the Bank was, in the opinion of a National Bank Examiner, on the eve of a run which would possibly force it to suspend business, and that, with this information, Ekstrom assisted the Joint Company to make a withdrawal of a portion of its deposit in the Bank, which had the effect of giving to the Joint Company a preference over other depositors, to the amount of the deposit withdrawn. On the basis of the existence of this principle, Respondent, in his Bill of Complaint, prayed as follows:

"Second.—That upon a hearing of this Bill, it may

be found and decreed by the Court that said Eric S. Ekstrom occupied a dual and confidential relation with reference to said The Manufacturers National Bank and Trust Company of Rockford, Illinois, and the said Mechanics Universal Joint Company, a corporation, and that he used information which he gained in confidence at a meeting of the Directors of said The Manufacturers National Bank and Trust Company of Rockford, Illinois, *to the wrongful benefit* and *advantage* of the said Mechanics Universal Joint Company, a corporation."

and it was on the basis of the existence of this principle that the District Court found the law to be as recited in its conclusion of law No. 5:

"(5) It is the law that by virtue of the facts above mentioned the defendant, Eric S. Ekstrom, in causing said check to be drawn and paid, said Eric S. Ekstrom being a Director of the Manufacturers National Bank and Trust Company and occupying a confidential relation toward it when he drew said check for $42,761.12, and thereby caused a transfer of funds belonging to the defendant corporation from the Manufacturers Bank to the Third National Bank, then and there intended to prefer the defendant corporation over the other creditors of said bank and intended to prevent the assets of said bank from being distributed ratably, and that *his act* in so doing was in violation of Section 5242 of the Revised Statutes of the United States, *and was an act done in contemplation of insolvency* of said Manufacturers Bank."

In other words the court did not find that the *payment* was in violation of R. S. 5242, but that the *act of Ekstrom* was in violation of the Statute. May we respectfully suggest that Ekstrom's *only act* in the whole transaction was as an officer or agent of the Joint Company. Not in anything he did was he *acting* for or on behalf of the bank. It is conceded by Respondent that the Bank, at the time this check was honored and said payment made, was kept open for business, was receiving every deposit tendered to it, and was able to and did meet and pay every demand

made upon it, and that, on the day the check was paid the Bank kept open for business the whole of that banking day, and it is conceded that during that day it did not prefer the Joint Company over any other depositor who made a demand on that day, for it paid the demand of every depositor made upon it during the whole of that day. The proof is conclusive and uncontradicted that the Officers of the Bank, on the day the payment was made, had no expectation or intent to suspend the business of the Bank, and everything which they did indicates that they were willing to follow any suggestion of the Bank Examiner which would place the Bank in a more liquid position than it then was, in the hopes that, by following such suggestion, the credit of the Bank could be maintained.

It is further contended by Respondent that the withdrawal of the amount of the check by the Joint Company, because it was effected by a depositor whose President was also a Director of the Bank, who, as such Director had information not available to other depositors, was a species of fraud, and that, because the President of the Joint Company signed the check, his knowledge as to the alleged condition of the Bank was imputable to the Joint Company, and the conclusion is drawn by Respondent, from these facts, that it was fraudulent or inequitable or in violation of some principle of the common law for the Joint Company to take advantage of information as to the condition of the Bank which was acquired by its agent because he was a Director of the Bank.

It is conceded that the Joint Company had deposited a large amount of money in the Bank a few days prior to the withdrawal in question, and that it had on deposit, subject to its demand, an amount largely in excess of the check in question, and it must be conceded that, at common law, so long as the Bank remained open, not only was it the lawful right of the Joint Company to withdraw such part of its

deposit as it desired, but it was the legal obligation of the Bank to pay to the Joint Company, on demand, such part of the latter's deposit as the Joint Company demanded. Such was the implied contract between the Bank and its depositor at the time the deposit was received—to pay on demand so long as the Bank was open.

It is claimed by Respondent, although there is no proof in the Record to support the claim, that the Joint Company would not have made the withdrawal in question had not its President, Ekstrom, received the information (which Respondent characterizes as confidential), given to the Directors of the Bank by the Bank Examiner the day before the withdrawal was effected; that the withdrawal was not made in good faith or in the ordinary course of business by the Joint Company, but was made by it for the sole and only purpose of securing to itself an advantage which other depositors did not have, because it had knowledge of, or was chargeable with knowledge of, facts known only to the Directors of the Bank. While we deny the evidence in the Record justifies Respondent in his assumption as to the purpose of the withdrawal, we are willing to meet Respondent on the ground chosen by him, and, for the purposes of the argument only, to assume that the purposes of the withdrawal are as he contends.

Ekstrom, President of the Joint Company and Director of the Bank, did not, by the withdrawal, prefer himself, for he had no right or title to the deposits of the Joint Company. The most that can be claimed by Respondent is that Ekstrom, a Director of the Bank, "tipped off" to the Joint Company, information that he, as a Director of the Bank, should not have disclosed, and thereby the Joint Company was given advantage over other depositors. Or, to state it another way, that Ekstrom, by means of his

knowledge, so arranged it that his principal (the Joint Company) could take advantage of his knowledge and secure a preference over other creditors. So far as we are aware, no Federal Court has held that, under the circumstances of this case, in the absence of a Statute to the contrary, a depositor in a National Bank, or a contract creditor of any corporation, is incapacitated from receiving payment of his debt, because he has received inside information as to the possible financial embarrassment of his debtor.

It must be borne in mind in the consideration of this question that the Manufacturers Bank at the time this payment was made was a going institution, with no intention of retiring from the business for which it was organized. It may have been in unhappy financial circumstances. Its assets may not have been liquid, but there is not a scintilla of evidence that it was insolvent in the sense that its liabilities exceeded its assets, and the proof is clear that it was able to, and did, meet all the claims made upon it up to the time its Directors voted to turn the Bank over to the Comptroller for liquidation. It is conceded, and so found by the District Court, that the Bank had not committed any act of insolvency prior to the time the payment in question was made.

Now, suppose all the contentions of Respondent are true, and laying aside for the moment the provisions of R. S. 5242, what equitable or common law principle was violated by the payment made by the Bank to the Joint Company of a *bona fide* debt which the Bank owed to the Company?

Respondent urges that that line of authority which adheres to the doctrine that when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stock-

holders and creditors, and that its officers immediately, upon insolvency, become trustees of the assets of the corporation, charged with the duty of ratably distributing its assets among its creditors, is applicable, and if we correctly understand the position of Respondent, this trust fund principle should be carried to the extent, by the Courts, without statutory authority, that any preference to a *bona fide* creditor of a corporation after its insolvency, or at a time when its insolvency is imminent, especially if brought about through the assistance of a Director of a corporation, is fraudulent and void. This principle has frequently been argued to this Court and, so far as our diligence has advised us, this Court has never accepted it as sound. In the case of *Sanford Fork and Tool Company* v. *Howe & Company,* 157 U. S. 312, which was a bill in equity to set aside a mortgage given by a corporation, shortly prior to its insolvency, to certain of its Directors to secure endorsements of the Directors of prior indebtedness of the corporation and to bolster up the credit of the corporation by securing renewals of such prior indebtedness of the corporation which the Directors had guaranteed, the mortgage having been authorized by a vote of the stockholders, Mr. Justice Brewer, speaking for this Court, in that case, used the following language (317):

> "The case involves no breach of trust on the part of the agent toward the principal, but more closely resembles the case of an individual debtor giving preference to certain of his friends, and the general rule is that, in the absence of a Statute, a debtor has such *jus desponendi* in respect to his property that, although insolvent and contemplating a cessation of business and the surrender of his property to his creditors, he may lawfully prefer certain of them, even though thereby others receive no payment."

If this announcement of the law by this Court is applicable to the case at bar, then the question is determined. If the so-called "trust fund doctrine" or any other equitable

principle will prevent a corporation debtor from preferring one creditor to another, then it cannot be said that a corporation has such *jus disponendi* in respect to its property as an individual possesses. A corporation becomes insolvent just when an individual becomes so,—when it is unable to pay its debts from its own means as they become due.

The above case is not the only case in which this Court has been called upon to apply the so-called "trust fund doctrine". The "trust fund doctrine", as applied to the assets of corporations, solvent and insolvent, was fully discussed and explained by Mr. Justice Brewer in *Hollins* v. *Brierfield Coal & Iron Company,* 150 U. S. 371, and the determination of this Court is thus stated:

> "The expression, often used, that the property of a corporation constitutes a trust fund for its creditors, only means that when the corporation is insolvent, *and a Court of equity has possession of its assets for administration,* such assets must be apportioned to the payment of its debts before any distribution to its stockholders; but as between the corporation itself and its creditors, the former does not hold its property in trust, or subject to a lien in favor of the creditors, in any other sense than does an individual debtor." (Italics ours.)

Substantially the same language was used by this Court in *Graham* v. *La Crosse & M. R. Co.,* 102 U. S. 148, and in *Fogg* v. *Blair,* 133 U. S. 534, and in *Wabash, St. L. & P. R. Co.* v. *Hane,* 114 U. S. 587.

To determine in this case, irrespective of R. S. 5242, that the payment by the Bank to the Joint Company, under the circumstances shown by this Record, was an unlawful or fraudulent preference, would require, we believe, this Court to hold that some lien exists in favor of all creditors of an insolvent corporation, and to overrule its holdings in the above cases which have stood as the law of this

Court for nearly forty years. If the decisions of this Court in the above cases were founded on reason, and are applicable to the facts in this case, then the principle announced in those cases should be followed by this Court unless there is some grave reason for departing therefrom. This trust fund theory seems to have a singular fascination to Respondent and we concede that throughout the various State Courts there is some diversity of opinion as to its application, but there is no diversity of opinion in the decisions of this Court. We also appreciate that in many of the States which recognize the general right of a corporation, solvent or insolvent, to make preferences among its creditors, such preferences in favor of its own Directors on account of antecedent indebtedness, in the absence of special equities, are not sustained, and we have no fault to find with these holdings. But that principle has no application to the facts in the case at bar, for:

(a) The depositor to whom payment was made (the Joint Company) was neither an officer or director of the Bank.

(b) The Joint Company was a *bona fide* depositor in the Bank and, in making the payment to a *bona fide* depositor, the Bank was but carrying out the obligation that it legally owed the depositor, *i. e.*, to pay it on demand.

(c) There is no proof of any kind that the Manufacturers Bank was actually insolvent when the payment in question was made.

(d) The Bank had not ceased the business for which it was organized, nor was there any expectation on the part of its managing officers to cease continuing its business. The most that can be said is that the proof tends to show that, in the opinion of a Bank Examiner, but not in the opinion of the officers of the Bank, the Bank was faced with a probable run, which it might not be able to withstand.

(e) The Bank was keeping open, receiving deposits and meeting its obligations on the whole of the day the payment was made.

(f) There was no maturing obligation of the Bank which the officers knew it was unable to meet at the time the check in question was paid.

(g) Had the Bank refused to honor the depositor's demand, such refusal would have been an act of insolvency which would have been sufficient to end the business of the Bank.

(h) At the time of the payment the Bank was in complete control of and had title to its assets, and control thereof or title therein was neither in a receiver appointed by the Comptroller, or by a Court of equity.

It may be that in addition to the above facts Respondent will claim that some of the assets of the Bank had been severely criticized by the Comptroller, and that for several months previous to the payment in question the condition of the Bank had not been, in the opinion of the Comptroller, healthy; that the Bank was on a special list to be examined by the Comptroller every thirty days; that *in the opinion* of the Comptroller many of its assets were slow, some doubtful, and some appeared to be to him to be desperate, and that it was the *opinion* of the Comptroller that the Bank could not long function unless additional security was obtained or the criticized assets collected, and we concede, if the testimony offered was competent, there was such testimony, but there is no proof that the Bank, at the time these payments were made, had not complied with the demands of the Comptroller, and there was absolutely no proof made, or attempted, that the Bank was insolvent in the sense that its liabilities exceeded its assets, and the proof is clear, and the District Court so found, that it was able to and did meet all demands made upon it as they matured. While we believe the question has been authoritatively decided by this Court and there is no necessity for citing decisions of State Courts upon the question, yet to the extent of being perhaps justifiably criticized for

prolixity, we call the Court's attention to a few of the decisions of the State Courts definitely deciding this question. In *Van Alstyne* v. *Cook,* 25 N. Y. 489, the Court, in speaking of the assets of a solvent, limited partnership, said:

> "They are trust funds when the Courts of equity are properly appealed to in behalf of the partners, or any partner or creditor, to protect and distribute the same upon equitable principles, and on such application assert the control over them. They are not trust funds in the hands of the partners any more than ordinary partnership property."

In *Tower* v. *Bank of River Raisin,* 2 Dougl. (Mich.) 530, it was held that a corporation has the same right to prefer one creditor over another that an individual has. This was followed in *Kendall* v. *Bishop,* 76 Mich. 624, and again in the case of *Bank of Montreal* v. *J. E. Potts Salt Company,* 90 Mich. 345, where it was held that:

> "A corporation may, *in the absence of legislative restriction,* deal with its property precisely as an individual may, and may prefer one creditor over another; and hence the assets do not become a trust fund for *pro rata* distribution among all its creditors, until such time as steps are taken under the 'closing up act'."

This trust fund doctrine is luminously described by Judge Mitchell in *Hospes* v. *Northwestern Manufacturing and Car Company,* 48 Minn. 174, who demonstrates, *unless prohibited by Statute,* an insolvent corporation has the same right as an individual to prefer creditors, and that there is no solid foundation for the doctrine that the insolvency of a corporation has the effect of converting its assets into a "trust fund", in any proper sense of the term. In *Catlin* v. *Eagle Bank,* 6 Conn. 235, the Court holds that the mere insolvency of a corporation neither impairs its power to manage its affairs, nor converts its property into a trust fund for the benefit of its creditors. And this was

reiterated by the Supreme Court of Connecticut in the case of *Pondville Company* v. *Clark*, 25 Conn. 97. In the former case the Court discussed the question at great length. In the course of its opinion it says:

> "The cases of an individual and of a corporation in the matter under discussion, it appears then, are not merely analagous but identical, and I discern no reason for the slightest difference between them • • •. The insolvent banking corporation is just as much a trustee of its creditors, and no more, as the insolvent individual is a trustee of his creditors."

The same doctrine as to when the assets of an insolvent corporation become trust funds was declared by the Supreme Court of Missouri in *La Grange Butter Tub Company* v. *National Bank of Commerce*, 122 Missouri 154. That Court said:

> "In case of an insolvent corporation a Court of equity will make distribution of the corporation assets *pro rata* among the corporation creditors, and to that end will regard the corporation property as a trust fund. It is in this sense, and upon this principle, that the assets are trust funds. *They are trust funds when a Court of equity is appealed to in behalf of any member of a corporation or creditors to protect and distribute the assets upon equitable principles.*"

And again in *Alberger* v. *National Bank of Commerce*, 123 Missouri 313, Judge Barclay, in speaking of the notion that insolvency transforms the assets of a corporation into a trust fund, said:

> "This theory seems to have a singular fascination to some learned jurists, but, in our opinion, it is wholly untenable as applied to the facts of such a case as that before us, under the law of Missouri."

And, after a very thorough and instructive discussion of the question, he concludes that:

> "The creditor of a corporation has the same right to secure, by superior diligence or persistency and to retain, a preference for his claim against a private corporation, that he would have were his debtor an indi-

vidual engaged in the same line of business, provided, always, that the transaction is honest,—that is to say, not a mere cover to a purpose to hinder, delay or defraud other creditors of the failing debtor."

Such is also the declared law of the State of New Jersey in *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 640. The Court said:

> "If there be no legislative prohibition against the transfer of corporate property or its use in preferring creditors after insolvent, no reason can be given why such transaction should be invalidated, which would not also invalidate the like transaction of individuals. Both reason and authority establish the proposition that a corporation may sell and transfer its property, and may prefer its creditors although it is insolvent, unless such conduct is prohibited by law."

The Supreme Court of Arkansas in the case of *Worthen* v. *Griffith*, 59 Ark. 562, holds the same way and that:

> "It is only when a Court of equity at the instance of a proper party, and in a proper proceeding, has taken possession of the assets of an insolvent corporation, that its assets may in this State be properly said to be a trust fund for its creditors."

The same question as to the right of an insolvent corporation to make preferences was before the Court in *Gould* v. *Little Rock, M. R. & T. R. Co.*, 52 Fed. Rep. 680. In that case Judge Caldwell said that it was the settled law in Arkansas (from which State the case came) that it might lawfully do so, and added this significant statement:

> "The established rule in that State is in harmony with the general, though not quite universal current of authority on this question."

After citing a large number of supporting authorities he adds:

> "The cases which hold the contrary doctrine are bottomed on the erroneous theory that the insolvency of a corporation in effect dissolves it and makes the Directors mere trustees to distribute the assets ratably among its creditors. It is undoubtedly true that the property of a corporation is, in one sense, a trust fund for the payment of its debts; but this rule means no

more than that the property of the corporation cannot be distributed among its stockholders, or applied to any purpose foreign to the legitimate business of the corporation, until its debts are paid. The rule, so far as it relates to the payment of debts, is satisfied whenever the property of a corporation is applied to the payment of any of its *bona fide* debts. The rule, as has been often pointed out, does not prevent a corporation, whether solvent or insolvent, from making a preference among its creditors, and exercising in good faith absolute dominion over its property in the conduct of its legitimate corporate business, so long as its right to do so is not restrained by Statute or judicial proceedings."

The Supreme Court of Alabama in the case of *O'Bear Jewelry Co.* v. *Volfer,* 100 Ala. 205, 28 L. R. A. 707, uses the following language:

"There is nothing clearer in principle than the proposition that the property of a corporation, solvent or insolvent, bears identically the same relation to the creditors of such corporations as the property of an individual or copartnership, solvent or insolvent, sustains to the creditors of the individual or partnership, and is or is not to be impressed with a trust character upon the circumstances and under the same conditions in the first case as in the latter two."

In the case of *Thompson-Howard Electric Light Co.* v. *Henderson Electric & G. L. Co.,* 21 S. E. 951, the Supreme Court of North Carolina deliberately reversed a former holding sustaining the trust fund theory and declared generally that the relation between a corporation creditor and the corporation, whether solvent or insolvent, is simply that of creditor and debtor, and that the creditor had no equitable claim upon the corporation assets either because it was a corporation or because it was insolvent. The Supreme Court of Indiana, in the case of *First National Bank* v. *Dovetail B. & G. Co.,* 143 Ind. 550, 40 N. E. 810, announces that the law of Indiana is the same. In the State of Illinois, where this case arose, a case analogous to the case at

bar was decided by that Court and the trust fund doctrine repudiated. The case of *Rockford Grocery Co.* v. *Grocery Company,* 175 Ill. 89, was a case where the Grocery Company borrowed money of a Bank, which indebtedness was guaranteed by its Directors. Thereafter, it became insolvent and by authority of the Directors a judgment note was given the Bank in lieu of the original note, on which judgment was at once taken and the property of the corporation sold. Another creditor recovered judgment thereafter and, on writ of execution returned *nulla bona,* filed a creditor's bill against said Directors seeking to hold them personally liable for a breach of trust, setting up the foregoing facts, and alleging fraud in giving said judgment note, while said corporation was known to them to be insolvent, for the purpose of preferring the Bank, and through it the Directors, over other creditors. The Supreme Court of Illinois said (p. 92):

> "The corporation being insolvent and the Directors being guarantors of said debt, were they at such time legally authorized to give such preference? The principle is firmly established, that *in the absence of statutory prohibition,* an insolvent corporation can prefer its creditors the same as any individual, which preference, of course, is given by the action of the officers of the corporation. The law is, however, that an insolvent corporation cannot prefer a creditor who, at the time, is a Director therein. Is the creditor deprived of the legal right of this preference by reason of the fact that such debt of the corporation is guaranteed by one or all of the Directors? * * * For, if the Directors, in such case, have no legal right to give, the creditor has no legal right to receive, such preference. One proposition is necessarily the corollary of the other, for the element of fraud is involved in such preference, if illegal * * * The Directors were not the creditors of the corporation and were not primarily standing in that relation to it. The creditor loaned the money to the corporation in good faith, while solvent and a going concern, and the money so obtained was used for its benefit. On no principle of law or reason can such

creditor be deprived of its right to a preference merely because the Directors guaranteed the debt. * * * It necessarily follows that fraud could not be predicated on the act of the Directors in giving this judgment note to the Bank, which resulted in a preference to it, as a creditor, in the distribution of the assets of said corporation."

In the case of *Wheeler* v. *Matthews*, 70 Fla. 317, 70 So. 416, the Supreme Court of Florida, speaking through Judge Ellis, said:

"While the officers of an insolvent corporation are referred to as trustees of the corporation's creditors in the case of *Southern Life Ins. Co.* v. *Lanier*, 5 Fla. 110, we do not conceive the meaning of the Court to have been that the assets of an insolvent corporation become immediately upon its insolvency a trust fund or estate, as to which the corporation or its officers become the trustees and the creditors of the corporation the *cestuis que trustent* thereof; that by the mere act of becoming insolvent the assets of the corporation which were not charged with any trust before were changed into a trust fund or estate for the benefit of the corporation's creditors, so that it may be administered as such by a court of equity. This doctrine which is said to have originated in a decision by Judge Story in *Wood* v. *Drummer*, 3 Mason 308, Fed. Case No. 17944, has never been adopted in this State. The assets of an insolvent corporation may not be distributed among the shareholders without first providing for the corporate debts. To this extent only it may be said that the officers of an insolvent corporation are trustees of its creditors. When a court of chancery upon some recognized principle of equity jurisdiction takes possession of the insolvent corporation's assets, it will administer them on the theory that in equity they belong to the creditors rather than to the corporation. *Graham* v. *R. R. Co.* 108 U. S. 148; *Fogg* v. *Blair*, 133 U. S. 534 (541); *Hospes* v. *N. W. Mfg. & Car Co.* 48 Minn. 174; *O'Bear Jewelry Co.* v. *Volfer*, 100 Ala. 205."

A corporation, although it may be hopelessly insolvent, and although it may be about to go into the hands of a receiver, or to assign for the benefit of creditors, or may be

in the act of making an assignment, has the same power as a natural person to prefer one or more creditors to the exclusion of others, *unless it is prevented from doing so by some express statutory provision.*

3 Clark & M. Corp. p. 2365, Sec. 780.
Tiffany Bank & Banking, p. 346.
Merced Bank v. *Ivett*, 127 Cal. 134, 59 Pac. 393.
2 Bolles Banking, p. 803.
Grand De Tour Plow Co. v. *Rude Bros. Mfg. Co.* 60 Kas. 145, 55 Pac. 848.
Ames & T. Co. v. *Heslet*, 19 Mont. 188, 61 Am. St. Rep. 496.
Warfield, H. & Co. v. *Marshall Canning Co.* 72 Iowa 666, 2 Am. St. Rep. 263.
Blair v. *Ill. Steel Co.* 159 Ill. 350.
West v. *Hanson Produce Co.* 6 Colo. App. 467.
National Bank v. *Scott & Co.* 18 Utah 400.
Colorado Fuel & Iron Co. v. *Western Hardware Co.* 16 Utah 4, 50 Pac. 628.
Levering v. *Brinck*, 146 Ind. 545, 45 N. E. 775.
Slack v. *Northwestern Nat. Bank*, 103 Wis. 57, 74 Am. St. Rep. 841.
Wilson v. *Baker Clothing Co.* 25 Idaho 378, 50 L. R. A. (N. S.) 239.
O'Brien, Receiver, v. *East River Bridge Co.* 161 N. Y. 539, 48 L. R. A. 122.
Livingston v. *Columbian Banking Co.* 81 S. C. 244, 22 L. R. A. (N. S.) 445.

A preference is an advantage and to be a prohibited preference it must either be one which contravenes some equitable principle or violates some positive statutory provision. In neither instance can it exist if there is no insolvency, because if there is no insolvency there can be no inequality in the payment of creditors, and without inequal-

ity there is no advantage. At the foundation of the investigation, therefore, lies the inquiry whether on June 13, when the check in question was paid, the Manufacturers Bank was insolvent. But before this inquiry can be answered accurately or intelligently, it is necessary that there should be a clear understanding of what is meant by the term "insolvency". If insolvency means a condition where liabilities are greater than the value of assets, then there is no proof in this record of any kind or character that the Bank was insolvent, unless it can be said that the *opinion* of the Comptroller, founded on the *opinion* of the Examiner, as to the value of assets, is sufficient proof in such a case as this to prove that fact. Such a test of insolvency, however, would wreck a large proportion of flourishing Banks, because there were few Banks in the year 1931 whose assets were not to some extent depreciated, slow or frozen or subject to criticism by the Comptroller. But, if insolvency means merely an inability to pay debts when and as they mature, in the ordinary course of business, then the Bank was not insolvent at the time this payment was made, nor was it insolvent when the Directors of the Bank passed the Resolution to close its doors.

If there is credence to be placed in human testimony, not an Officer or Director of the Bank had any knowledge that the Bank was insolvent, in either sense of the term, at the time this payment was made. At the time that Baty, the Examiner, addressed the Directors of the Bank at the noon meeting of Jun 12, the President of the Bank, the Cashier of the Bank, the Vice President of the Bank, as well as Baty, the Bank Examiner, stated that, in their opinion, the Bank was solvent. On Sunday night, June 14, when the Bank Examiner demanded of the Directors that they pass the Resolution turning the Bank over to the Comptroller, every managing officer of the Bank who was present stated that in his opinion the Bank was solvent. The trust fund.

theory which Respondent invokes in this case has, as its foundation, the insolvency of the Bank. The Courts of those States, which adhere to the trust fund theory, state the rule to be that *when a corporation becomes insolvent* its assets in the hands of its officers become a trust fund for the benefit of its creditors, so that, applying the trust fund rule in its most liberal sense, it has no application in this case, because here there is no proof that the Bank was insolvent. The trust fund doctrine, which is the equitable principle relied upon by Respondent, is said to have had its origin in *Wodds case,* 3 Mason 308, Federal Cases No. 17944. But that was a contest between the stockholders and creditors of a Bank where the stockholders appropriated the assets to the exclusion of the creditors. But whatever the origin of the doctrine, it has never been viewed with favor by this Court. As we understand the opinions of this Court in the cases heretofore cited, it is only when the company has been dissolved or has become insolvent *and its assets are in the custody of a Court of equity,* or of an administrative officer of the Government, that this equitable doctrine arises. So long as the company is a going concern, having the possession and management of and title to its property, contracts made by and with the company are governed by the same principles of law as contracts between individuals. When a corporation has ceased to be a going concern, when it has been dissolved, when its assets have been taken over by a Court of Equity in an appropriate case, or when its assets have been seized by an administrative officer of the government for liquidation in a certain way, when it has no longer the possession and management of its property, it may well be said that all its assets and property become a trust fund, and that its Officers and Directors become trustees for the benefit of its creditors. If the specific contention of Respondent, that the payment of the check in question was void, because of

some equitable prohibition against its payment, is sound, then the rule must be that if a corporate depositor in a Bank draws its check upon that Bank, and the check is paid in the ordinary and usual course of business while the Bank is a going concern, the payment of that check is a prohibited preference, if two days afterwards the Bank closes its doors and goes into liquidation, and if one of the signers of the check for the corporate depositor was a Director or Officer of the Bank. This contention, if sustained, makes the Bank or its Officers trustees for the creditors while the Bank is a going concern and while it is still solvent, and this Court has not, so far as we are aware, carried the so-called trust doctrine to that extent. Under the most rigid and extreme application of the trust fund doctrine, the Officers do not become trustees for the creditors, however they may stand toward the stockholders, until the corporation ceases to be a going concern, or at least until it is solvent. If this were otherwise, then no corporation would venture to be a depositor in a Bank of which one of its officers was a Director. There is no more reason for contending that the payment of the check in question constituted an unlawful preference by the Bank to the Joint Company, than there would be for challenging the validity of any payments made by the Bank to the Joint Company within two weeks prior to the payment in question. The mere proximity of the time of the payment to the actual suspension, can make no difference in the legal principle, if it be a legal principle, that such payments as these are preferences.

CASES CITED BY RESPONDENT.

The cases cited by Respondent to sustain his contention that the payment of this check constituted a prohibited preference, *at the common law,* irrespective of the Statute, are as follows:

American Surety Company v. *Jackson,* 24 Fed. (2) 768.

Federal Reserve Bank v. *Omaha National Bank,* 45 Fed. (2) 511.

Vann v. *Federal Reserve Bank of Richmond,* 47 Fed. (2) 786.

Corbin v. *Mumford,* 148 Fed. 37.

Swentzel v. *Penn. Bank,* 147 Pa. 153.

Lamb v. *Ulrich,* 94 Okla. 240.

First National Bank and Trust Company v. *Manning,* 116 Conn. 335.

The cases cited from the Federal Courts above noted, with the exception of *Corbin* v. *Mumford,* are all cases founded upon R. S. 5242. In every case the payment there held invalid was made *after the commission* of an act of insolvency and in some instances after the Bank was closed. In the case of *Corbin* v. *Mumford,* which was the decision of a District Court of Georgia, the action was brought by a Trustee in Bankruptcy to set aside a preference under Sections 60a-b of the Bankruptcy Act. The proceeding was purely statutory, and was an action brought by the Trustee to recover back a preference obtained by a creditor within four months of bankruptcy, and the Bankruptcy Statute in force at the time made the preference voidable or recoverable only upon the recipient of the preference having had reasonable cause to believe that it was intended thereby to give a preference. All that is said in the case is said with reference to the application of that Statute.—Section 60b of the Bankruptcy Act. We fail utterly to ap-

preciate how this case is any authority to sustain the proposition that the payment of the check in the case at bar was an unlawful preference at the common law. After discussing the other cases above cited, we will discuss the application of the rule in bankruptcy to a payment by a National Bank.

In *Swentzel* v. *Penn. Bank,* the money was drawn after the Bank had suspended payment, and was drawn by a depositor who was an Officer of the Bank. In the case of *First National Bank and Trust Company* v. *Manning,* the facts were as follows:

One Treat was Treasurer of Broadway Bank and Defendant Manning, who was Treat's mother-in-law, had an account in the Savings Department of the Bank, which was carried under the heading "Carrie Manning, R. V. Treat, Agent", the pass-book being in the possession of Treat, who had authority to sign withdrawal orders and manage the account. The Bank became insolvent in December, 1931, and on Thursday, December 17, a serious "run" started on the Bank, which continued on Friday, Saturday, Monday and Tuesday. On Tuesday, December 22, at ten minutes of three, no funds remained in the Bank, payment was suspended, and by order of the Bank Commissioner the Bank did not open the following day.

On Sunday, December 20, Treat visited Mrs. Manning, who told him she had read about the "run" on the Bank, requested him to look out for her money which she did not wish "tied up" in the event the Bank failed, and told him to withdraw it. Treat did not withdraw the money on Monday, but on Tuesday afternoon, *after he learned the Bank was about to close,* he directed a Teller to bring $500.00, the total amount of the deposit, and a withdrawal order, to his private office, and not to say anything about it, and thereupon withdrew the $500.00 and closed the account. At

the time there was a good deal of excitement at the Bank and a large number of depositors were in line waiting to make withdrawals at the regular windows, *many of whom were unable to procure their funds before the Bank suspended payment.* Treat knew that the Bank was insolvent and was about to close when he made the withdrawal, which he made *as agent and Treasurer of the Bank,* and as agent of Mrs. Manning. Commenting upon this evidence, the Supreme Court of Connecticuit said:

> "The trial Court's conclusions that the withdrawal of this deposit by Treat was made in contemplation of insolvency was justifiably based upon its finding that he knew that the Bank was insolvent and that it was about to close. The finding also supports the conclusion that the withdrawal was made with the intent to prefer the depositor, Mrs. Manning. *In making the withdrawal Treat was acting both as an official of the Bank and as an agent for his mother-in-law, Mrs. Manning.* His knowledge as such agent was her knowledge. The legal situation, therefore, does not differ from that which would have existed if, with knowledge that the Bank was about to close, he had withdrawn his own deposit, in which case the almost inevitable inference would be that it was done in order to obtain a preference over other depositors. Moreover, the withdrawal was not made in the ordinary course of business and was effected by the use of facilities not available to other depositors. It is true the Bank was then open for business and depositors were in line waiting to make withdrawals. Many of these, however, were unable to procure their funds before the Bank closed, while Treat, in his capacity as an official of the Bank, and with his knowledge that it was about to close, obtained immediate payment of this deposit to himself as agent of Mrs. Manning."

In the above case, a Statute of Connecticut was involved quite similar to R. S. 5242, and the real question there decided was that, because the payment was made in violation of the conditions of the Connecticut Statute, the transfer was an unlawful and preferential one which was

avoided. The case cannot be fairly cited as authority sustaining any common law or trust fund theory. The elements which appear in that case, which do not appear in the case at bar, are numerous. There, the Officer of the Bank who made the payment was an agent of the depositor and he made the payment to himself as agent of both parties. No such situation appears in the case at bar. In that case the payment was made at a time when the Officer of the Bank who directed it was fully aware that the Bank was on the verge of closing, and there is no question but that the Officer of the Bank who directed the payment did so for the purpose of preferring the depositor over other depositors of the Bank. That situation does not appear in the case at bar. In that case there was a run on the Bank and the depositors were standing in line waiting their turn to get to the paying window. Mrs. Manning was not in line. Although she had directed the withdrawal of her money on Sunday, Treat, her agent, did not withdraw it until it became apparent to him that there were not funds enough in the Bank to meet the demands of the depositors who were then lined up in front of the paying windows. And, too, for the purpose of preferring Mrs. Manning, Treat, the Officer of the Bank, paid this money, not in regular course of business through the Bank's paying windows, but effected it by use of facilities and advantages which he, as an Officer of the Bank, possessed, over the demanding depositors who were at the Bank's windows. Whatever may be said of the opinion of the Supreme Court of Connecticut in the Manning case, it is neither authority for Respondent to sustain the principle for which he cites it, nor is it, on the facts, analagous to the case at bar. The case of *Lamb* v. *Ulrich,* 94 Okla. 240, cited by Respondent, while presenting some facts similar to the case at bar, has just enough other facts to clearly distinguish it, and it is apparent from the opinion that these other facts are the facts

which influenced the Court. The following facts in that case, but not in this, appearing:

1. The depositors were stockholders of the Bank.

2. The payment was not a usual withdrawal by a depositor, but was a trading of securities in payment of the checks of certain depositors, at a time when the depositors knew the Bank was having a hard time and when the depositors stated that they wanted to put their money in something they could get their money out of in case they wanted it.

3. That the transaction was an unusual one and not in regular course of business of the Bank, the Cashier of the Bank testifying that such a transaction had never occurred before in his ten years of banking experience.

The above case was not founded upon any equitable principle. It was a suit in a State Court by a Receiver of a National Bank to avoid a transfer of securities made by the National Bank to certain of its depositors and was founded upon R. S. 5242.

The case of *Rice* v. *City of Columbia,* 143 S. Car. 516, also cited by Respondent, is a case which applies the trust fund doctrine which this Court has so frequently repudiated, that it seems of little avail to discuss that case.

Reverting now to the case of *Corbin* v. *Mumford,* 148 Fed. 37, which Respondent claims is authority that the payment of the check in question constituted a prohibited preference at common law, we have only to state that the case does not so determine. The case was brought in 1906 by a Trustee in Bankruptcy to set aside an alleged unlawful preference under the Bankruptcy Act of 1898, and as the effect of Section 60b of the Bankruptcy Act was that the preference could only be avoided if the person receiving the preference had cause to believe it was intended as a preference. If he did not have cause to believe to so believe he could keep the property transferred to him. (*Pirie* v. *Chicago Title & Trust Co.* 182 U. S. 438, 447.) The Court dis-

cusses at great length in the *Corbin* case the knowledge and purpose of the recipient of the payment. As before stated, as the case was founded on a Statute, and the relief sought grounded on a Statute, nothing that the Court said has any application to the right of a debtor at common law to prefer a creditor.

THE RULE AND STATUTE IN BANKRUPTCY HAS NO APPLICATION TO THE CASE AT BAR.

As Respondent has indicated in his reply to Petition for Certiorari in this case, that the lawfulness of a preference at common law must be read, since 1898, in connection with the Bankruptcy Statute, we will answer that suggestion at this point. As we understand Respondent, it is his claim that, analagous to the rule and Statute in Bankruptcy, the *intent* of the *recipient* of the payment is controlling. It is not necessary to remind this Court that the Bankruptcy Act has no reference to National Banks. Banks are expressly excepted from the operation of the Bankruptcy Act by Section 22 thereof. Although Section 60b of the Bankruptcy Act provides that if the creditor receiving the payment has reasonable cause to believe that a preference would be thereby effected, the payment may be avoided as preferential, Congress has imposed no such condition to a payment made by a National Bank while the Bank is in control of its assets, and certainly it cannot be urged that Congress does not have the right to provide for the avoiding of preferences in the case of National Banks by one rule and of avoiding preferences by Bankrupts, other than National Banks, by another rule. And Congress has done so. The statutory provisions relative to avoiding of preferential payments by National Banks were contained in the original National Bank Act of June 3, 1864, (13 Statutes 115), and although Section 5242 has been amended slightly,

in substance it stands as originally enacted. It antedates by many years the Statutes avoiding preferences contained in the Bankruptcy Act of 1898, and there is nothing in the Bankruptcy Act or any of its amendments which indicates that it was the intention of Congress by the Bankruptcy Act to amend, alter or change the definitions of voidable preferences contained in the National Bank Act. The Bankruptcy Act and the decisions under it are to be excluded from thought.

It is not improbable, however, that the Circuit Court of Appeals, and the District Court, had in mind the fact that the voidability of a preference in bankruptcy is determined by the intent of the payee, and that they inadvertently applied that rule in this case, for the Circuit Court of Appeals in its opinion (R. 234) states:

> "The Court found that prior to the payment of the controverted check, the Bank had committed no act of *bankruptcy.*" (Italics ours.)

Of course, this was a slip of the pen by the writer of the opinion. The District Court had made no reference to "bankruptcy" in its finding, but it is obvious that the writer of the opinion of the Circuit Court of Appeals had the rule of preference in "bankruptcy" in mind and applied it, for it held the intention of Ekstrom, to benefit the recipient of the payment, as sufficient to avoid the payment, as did the District Court and based affirmance of the decree on that ground.

R. S. 5236 IN NO WAY CHANGES THE RULE, BECAUSE THAT SECTION HAS REFERENCE ONLY TO THE DISTRIBUTION OF ASSETS OF A BANK AFTER THE ASSETS ARE SURRENDERED BY THE CORPORATION TO THE COMPTROLLER, AND AFTER THE LATTER HAS LIQUIDATED THE SAME.

It is contended by Respondent that, because of R. S. 5236, that Congress has announced that it is the general public

policy of the nation that assets of an insolvent Bank should be *prorated* among depositors, and that therefore this Court is justified in inaugurating a principle of law or equity to carry out the public policy of the nation as expressed in its Statutes, and to set aside every transaction, whenever made, which will defeat that policy. A full and complete answer is that R. S. 5236 has no application to the assets of a National Bank, until *after* the Comptroller has taken possession of the assets of the Bank and is in process of liquidating the same. The Statute has no reference to assets of a Bank in possession of the Bank while the Bank is conducting its business and before the Comptroller has seized its assets and appointed a Receiver. The assets of a National Bank in the hands of a Receiver, appointed by the Comptroller, are a trust fund in the same sense as are the assets of a corporation after a Court of equity has taken hold of the same in a proper proceeding. But prior to the appointment of a Receiver by the Comptroller, and during the time that the Bank is in operation and in the conduct of its business and is a going concern, the Bank, and not the Comptroller, has the control of its assets, and no Statutes have been enacted by Congress except Section 5242 which in any way attempt to control the matter of preference *prior to* the appointment of a Receiver. There being no Statute which changes the common law on the subject, and the law being that a preference by a corporation to a *bona fide* creditor is legal, unless prohibited by Statute, the question is whether this Court deems this case of such great moment that it will overrule its repeated decisions and initiate a rule of law to avoid such preference. Such an argument was made to the Supreme Court of Iowa and was answered by Judge Dillon in the case of *Buell* v. *Buckingham*, 16 Iowa 284; 85 Am. Dec. 516, wherein he says:

> "The rule should be declared by the legislature, which has the constitutional power to make and change the law, and not by the Courts, which have no such power."

A very complete annotation on the legality of a preference among creditors given by an insolvent corporation is found in the note to *Lyons-Thomas Hardware Co.* v. *Perry Stove Manufacturing Co.*, 22 L. R. A. 802, where many cases to which we have not referred are cited and the conclusion arrived at by the compiler of the note is thus stated:

> "On examination of the decisions, it is clear that the weight of authority is overwhelmingly in favor of the legality of a preference to ordinary creditors, *except as restricted by Statute*, and overwhelmingly against the validity of such preferences when made in favor of Directors."

At common law the diligent creditor has always been favored. The diligent creditor, we apprehend, is one who closely scrutinizes the actions and business of his debtor, who has his eyes and ears open to see or hear evidences of financial embarrassment on the part of his debtor. He has a right to act upon the information he receives and the facts as he discovers them. If a creditor enjoys a favored position, as if he has an agent who is a Director of a corporation which is his debtor, he has the right to know what his agent knows. If his agent makes an honest disclosure to the principal of facts which come to him at a Directors' meeting, his principal has a lawful right to receive that information and act upon it.

Respondent cites the cases of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 and *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216 (266) as holding that R. S. 5236 establishes by Federal Law a system of equal distribution of assets of National Banks and he argues that said Section prevents a Bank, when it is in control of its assets and functioning as a Bank, and before the appointment of a Receiver, from lawfully preferring a creditor, and in the Court below he attempted to build up an argument founded upon the proposition that the Court should, in some way, inaugurate a rule of equity to carry out the public policy of the Nation, as

expressed in R. S. 5236, and he cites the above cases as authority for the proposition that Congress has by R. S. 5236 attempted to announce the public policy of the Nation as to the handling of assets by a Bank *before* a Receiver is appointed. Respondent misapprehends the effect of those decisions, and forgets to read the statements of this Court in the light of the facts this Court was there considering. Neither of those cases involved the validity of a preference made by a Bank to its creditor, at a time when the Bank had control of its assets and *before* the assets were taken over by the Receiver appointed by the Comptroller. In the *Davis* v. *Elmira Bank* case a savings bank depositor, *after the appointment of a Receiver,* asserted a preference because a statute of New York provided that it shall be the duty of

> "the trustee, assignee or receiver of any Bank or trust company which shall become insolvent" to apply the assets received by him, "in the first place, to the payment in full of any sum or sums of money deposited therewith by any savings bank", etc.

Suit was brought, in the State Court, by the Elmira Savings Bank, *against the Receiver of a National Bank,* to have the Court adjudicate the preference and to require the National Bank Receiver, in the distribution of the assets in his hands, to first pay the Elmira Bank in full before he made ratable distribution to the general creditors. All this Court held in that case was that the Act of Congress, R. S. 5236, took precedence over a State Statute, in case of conflict or repugnancy, where the distribution was of assets of a National Bank. It is clear that this Court, in its discussion, was confining its decision to a distribution *after,* and not *before,* the assets came into the hands of the Receiver, for this Court says (top of page 284) in discussing the application of the State and Federal Statutes:

> "Both" (Statutes) "cover the assets of such Banks *coming, after insolvency, into the hands of the Officer or person authorized to administer them.*"

In the case of *Jennings* v. *U. S. F. & G. Co.*, 294 U. S. 216, the contest as in the *Davis* case was by a creditor of a National Bank, *after* the assets were in the hands of the Receiver of a National Bank, to impress a trust upon funds *in his hands* in favor of the U. S. F. & G. Co., and to require the Receiver to prefer said company in the distribution of assets in his hands, before making ratable distribution to the other general creditors. It was there claimed the trust arose because of an Indiana Statute known as the Bank Collection Code. This Court held that, as applied to the distribution of assets of a National Bank, *in the hands of a Receiver*, that such Code was in conflict with and repugnant to R. S. 5236 and therefore was superseded by the latter, or as Justice Cardoza so aptly worded it on page 226:

> "As applied to a National Bank, the preference is plainly inconsistent with the system of equal distribution established by Federal Law R. S. 5236."

Both of the above cases were suits brought *to enforce* a preference to assets in the hands of a Receiver of a National Bank. Here the case is one of a Receiver seeking to *set aside* a preference given by the Bank when the assets were in its hands, and before the same had come into *custodia legis*. And the Congress has not provided against preferences given by a National Bank while the assets are under its control except by R. S. 5242, and R. S. 5236 has no application.

If the *payment* involved in the case at bar was made at a time and under circumstances inhibited by R. S. 5242, that is an end of the matter and the decree below was right. If, on the other hand, as we most earnestly insist, the payment was not made at a time or under circumstances condemned in R. S. 5242, then there is neither equitable nor common law ground for avoiding the preference and R. S. 5236 has no application.

Much has heretofore been said and no doubt will be said

by Respondent concerning the abuse by Ekstrom of a fiduciary relation. It is claimed that Ekstrom received his information as to the condition of the Bank at a Directors' meeting and, that because thereof, his information was confidential and his mouth, in equity, should be sealed. We know of no such law. Ekstrom was a Director of the Bank. He was also the President of the Joint Company. There was no secret about this dual relationship. The Bank knew it. Presumably the depositors knew it, and presumably the Joint Company knew of it. It is not at all unlikely that Ekstrom was selected as a Director of the Bank by the stockholders in order to attract deposits from the Joint Company. Was it any breach of morals or confidence for Ekstrom, if he honestly believed the Bank sound, to advise the Joint Company of his belief and of the facts upon which he based his belief, even though those facts should have been disclosed at a Directors' meeting, in order to induce the Joint Company to make deposits at the Bank? Surely no one could honestly contend that there was any breach of confidence in such a situation. Why then, when Ekstrom learned at a Directors' meeting that conditions in banking circles were such, that in the opinion of a Bank Examiner the Bank might suffer a run which it possibly might not be able to withstand, can it be said that he committed any fraud or breach of confidence if he told his employer, the Joint Company, what he had heard? It seems to us that Respondent's arguments concerning the duty of Ekstrom to keep as confidential any information which he received in his capacity as a Bank Director, is not consistent. He claims now that Ekstrom knew from information conveyed to him by a Bank Examiner at a Directors' meeting of the Bank that the Bank was facing a run which would possibly wipe it out. He claims that, in addition to this, Ekstrom knew from letters and reports sent to him by the Comptroller of the Currency that the Bank was in a precarious situation

for many months prior to the withdrawal in question. He seriously urges that because of the facts conveyed to Ekstrom at the Directors' meeting, coupled with the knowledge that Ekstrom had, as a Director of the Bank, of facts which had been conveyed to the Directors by the Comptroller, that it was a breach of confidence for Ekstrom to reveal this information to a Company of which he was President, and that Ekstrom should have, in equity kept this information secret from the Joint Company, The stockholders of the Bank were in no way effected by anything that Ekstrom, as a Director, disclosed. The stockholders of the Bank had made Ekstrom a Director. The creditors had taken no part in his selection, and he owed no duty to the creditors, except to see that the assets of the Bank were applied to the payment of its debts before any distribution was made to stockholders. Neither the stockholders, nor the Bank, were concerned in the slightest with the question as to whether the assets were pro rated among the creditors. It will be noted that deposits, far exceeding the amount of the check withdrawn, were made by the Joint Company, in the Bank, after the last communication that had been made by the Comptroller to the Directors of the Bank, and Respondent argues and will argue that because Ekstrom was a Director of the Bank and knew what the Comptroller thought about the situation of the Bank that he should have conveyed that information to his employer, the Joint Company, and that the Joint Company is chargeable with that knowledge, and with such knowledge saw fit to deposit its money in an insolvent Bank when it made the deposits, and chose to do so. These arguments are not consistent. If the information which Ekstrom received at a Directors' meeting from an agent of the Comptroller coupled with knowledge coming directly to him from the Comptroller is so sacred and confidential that it would be a fraud on Ekstrom's part for him to convey that informa-

tion to the Joint Company, then certainly the information which he received directly from the Comptroller, by letters and reports of examination, are just as sacred and just as confidential, and if it was the duty of Ekstrom to keep in confidence the information which he received from the Comptroller as to the condition of the Bank, and it was a fraud to divulge that information to the Joint Company, then certainly there can be no presumption that the depositor, the Joint Company, knew what the Comptroller had said about the Bank, even though Ekstrom was the President of the depositor. This brings us to the next question.

COUNTERCLAIM.

If the letters from the Comptroller to the Directors, accompanying the reports of examination of the Bank for December and May were competent in evidence, and if the effect of such letters and reports was competent and sufficient proof that the Bank was insolvent during the period from December to May, then we have a situation where the Joint Company has deposited large amounts of money during the month of June, and which, if made in a Bank at a time when the officers of the Bank knew that the same was hopelessly insolvent, were fraudulently received by the Bank, unless the depositor had equal knowledge of the condition of the Bank. The proof in this record is clear and uncontradicted that the Joint Company had no knowledge of the condition of the Bank unless the knowledge of Ekstrom, its President, was constructive notice to the Bank of all that Ekstrom knew. Respondent argues that the Joint Company is presumed to have had all the knowledge that Ekstrom, its President, had, even though the knowledge to Ekstrom came to him in confidence. In other words, in the one instance Respondent charges Ekstrom with a fraud and a breach of confidence of such a serious character as to jus-

tify a Court in decreeing that Ekstrom make restitution of the fund, for doing what amounts to giving notice to the Joint Company of what Ekstrom had heard at a Directors' meeting of the Bank concerning its condition. And, on the other hand, asking this Court to dismiss the counterclaim on the ground that Ekstrom's *duty was to convey* the information which he received from the Comptroller to the Joint Company, which was at least equally confidential.

(C)

WAS IT PERMISSIBLE FOR PLAINTIFF, IN THE COURT BELOW, TO JOIN IN ONE CAUSE OF ACTION IN EQUITY A COMPLAINT AGAINST A DEPOSITOR FOR RECEIVING A PAYMENT OF MONEY ALLEGED TO BE VOID UNDER R. S. 5242, AND IN THE SAME ACTION TO SEEK TO RECOVER FROM A DIRECTOR OF THE BANK FOR AN ALLEGED VIOLATION OF A COMMON LAW DUTY?

Respondent claims that his Bill of Complaint was double, *i. e.*, that it charged not only a violation of R. S. 5242, but also charged the violation of some common law or equitable principle making it inequitable or unlawful for the Joint Company to receive a preference, and unlawful or in violation of some confidence for Ekstrom to aid the Joint Company in securing the preference. It may be that the Bill of Complaint is of such a character. The Circuit Court of Appeals held it was, and intimates it affirmed the decree of the District Court, not because of the violation of a statute making the preference unlawful, but because of a violation of the supposed common law duty, namely, that "Ekstrom occupied a dual and confidential relation with reference to said Manufacturers Bank and the Joint Company, and that he used information which he gained in confidence at a meeting of the Directors of the Manufacturers Bank, to the wrongful benefit and advantage of the Joint Company." (See 2nd paragraph of prayer to Bill of Complaint. Rec-

ord 5) The Circuit Court of Appeals, in discussing this phase of the case, says: (Record 236)

> "But the Bill did not wholly rely upon Section 91" (R. S. 5242) "for a recovery. It also pleaded a charge of common law negligence. That this is a proper practice cannot be doubted. *Bowerman* v. *Hamner,* 250 U. S. 504."

The case of *Bowerman* v. *Hamner, supra,* is clearly distinguishable from the case at bar. In that case an action was brought by the Receiver of a National Bank against the executive officers and directors of the Bank, in equity, for an accounting and for a decree for such damages as the accounting disclosed the Plaintiff was entitled to. The Bill charged a breach of the statutory duty prescribed by R. S. 5200 and also a breach of a common law duty. The Bill was framed in the alternative, averring:

> (1) That the executive officers made, and that the Directors negligently permitted them to make, three designated loans, each in excess of one-tenth part of the paid-in and unimpaired capital stock and surplus of the Bank, in violation of Section 5200 of the Revised Statutes;
>
> (2) That beginning with 1910 the affairs of the Bank were grossly mismanaged by the executive officers with the negligent permission of the Directors; that of three designated loans, on which large losses were sustained, the one was made to a company without financial resources to justify such a loan, and without security, and with its capital stock owned principally by members of the family of the President of the Bank; that the two other designated loans were negligently made to persons without financial standing and without security sufficient to justify the making of them; that overdrafts aggregating large amounts were permitted to be made by many persons, *in violation of the By-laws* of the association, and that a dividend was declared and paid in July, 1910, when the capital stock and surplus of the Bank had been much impaired and its assets greatly depreciated. The gross mismanagement of the Bank, it is averred, caused the failure of the Bank and the loss for which recovery is prayed.

The action was not brought by the Receiver in the *Bowerman* case for the benefit of creditors of the Bank, but, as said by this Court, in its analysis of a similar Bill, in *Briggs* v. *Spaulding,* 141 U. S. 132, at Page 150—

> "The theory of this Bill is that the Defendants are liable, not to stockholders, nor to creditors, as such, but to the Bank, for losses alleged to have occurred during their period of office, because of their inattention."

The case at bar is not such a case as was considered by this Court in the *Bowerman* case. In that case the Court was considering a cause brought for the recovery of damages. (The equitable jurisdiction of the Court, as we understand it, was invoked because of the necessity of an accounting), caused by the unlawful and *negligent* acts of the managing officers and directors of a National Bank. All this Court held in the *Bowerman* case was that the common law liability of Directors for damages, flowing from their negligent acts, is not lessened by R. S. 5200, and that acts which were negligent at the common law could be jointed in such an action to recover damages, with acts which were unlawful because prohibited by the Statute.

In the case at bar, we have an entirely different situation. This was not an action for damages as against the Joint Company, but was an action to recover back a payment made by a Bank to a depositor, which payment was alleged to have been void because made under circumstances which Congress, by R. S. 5242, had declared *not an unlawful,* but a void payment. The suit in the *Bowerman* case, although in equity because of the necessity of an accounting, was, in fact, a tort action to recover damages from the managing officers and directors of the Bank arising out of their negligence. The officers and directors were the sole defendants. All were agents of the Bank.

Here, the suit as against the Joint Company is to re-

cover back from a depositor the amount of funds which had been paid to it under circumstances alleged to be such as would render the payment preferential and void. The action is analogous to a Bill to set aside a fraudulent conveyance and is properly in equity. Here, the depositor is joined with *one* director, as defendants, and if there be any liability on the part of the director charged, it is a liability separate and distinct from that of the depositor, and is enforcible at law only, and cannot be joined in an equitable action against the depositor.

In the *Bowerman* case, the acts which the directors and officers did, or omitted, were done or omitted by the defendants in their *official* capacity, and as agents of the Bank, and were negligent because the officers or directors violated a duty which they, as such officers and agents, owed at common law to their principal, and their omission to use care and their violation of a duty they owed to their corporation, resulted in damages to the corporation.

In the case at bar, the Joint Company was not an officer or director or agent of the Bank. It owed no duty to the Bank, either at common law or under the Statute. It had no relation to the Bank except that it was the Bank's creditor to the extent of its deposit, and no cause of action was alleged against it in which the Bank or the stockholders of the Bank were in any way interested, or concerned. On the other hand, Ekstrom, a co-defendant, was sued as a Director or agent of the Bank, but as a Director of the Bank it is not charged that he committed an act which was in violation of R. S. 5242, nor is it charged that, as such Director, he expressly breached or omitted to perform any duty which he, as a Director, owed to the Bank and which negligence caused the Bank damage. True, it is charged, he, as President of the Joint Company, signed the check of the Joint Company drawn on this Bank, but his act in so doing was not done *as a Director* of the Bank. It was done as an

agent of the Joint Company, to whom he owed the duty of affixing his name to a check, drawn on a deposit of his company, when his company desired to withdraw money from the Bank. As Director of the Bank, he owed no duty to the Bank to sign or refrain from signing a check for his employer, the Joint Company. He had nothing to do *as a Director of the Bank* in making payment of the check to the Joint Company. He did not act *for the Bank* in withdrawing the money. No duty he owed *to the Bank* was violated by him, either in signing the check or sending it to another bank for presentation for payment through the Clearing House. No cause of action for negligence *as a Director of the Bank* was charged in the Bill of Complaint, nor could such an action be predicated, against him, because of his signing the Joint Company's check and sending the same to an agent of the Joint Company for presentation to the Bank, because he owed no duty to the Bank in that connection. His entire *duty,* throughout the whole transaction, was to his employer, the Joint Company. As a Director of the Bank, he did no act in connection with the payment of the money. He did not act as a Director of the Bank, for the subject matter of the payment of the check was never considered at a Directors' meeting. Had there been a Directors' meeting held to consider the payment, or refusal to pay, this particular check, and he had knowingly refrained from attending the meeting, or had voted in favor of the payment of the check, and because of the action of the Directors, the paying officers of the Bank paid the check, then his action as a Director of the Bank might be open to challenge and there would be some logic in charging that he violated his duty to the Bank.

This Court has never held that it is permissible for a National Bank Receiver to complain of one Defendant who occupies the position of a depositor in a Bank, seeking to recover against the depositor under R. S. 5242, and in the

same suit to complain of one of the Bank's Directors for an alleged breach of confidential relation which, if a violation of any duty, would be a violation of a common law duty the Director *owed to the Bank.*

Let us examine the situation for a moment.

If the Joint Company, under circumstances enumerated in R. S. 5242, withdrew money from a Bank in which it had made a lawful deposit, and thereby effected a payment, by the Bank to it, which R. S. 5242 declares void, the action for relief would be analogous to a Bill to declare a fraudulent conveyance void and restore the property to the grantor. Under the Statute, a payment made under circumstances enumerated therein was declared void. As the payment had been made to a depositor (the Joint Company), the relief would be a decree that the depositor repay what it had unlawfully received, or, an action analogous to assumpsit—for money had and received, because the payment made to it was void. For a Receiver of a National Bank to join such an action with a *tort* action against a Director of a Bank would be an anomaly. It would be a combination of two actions— one in the nature of a bill in equity to set aside a preferential or fraudulent conveyance against a depositor arising out of a Statute—the other in the nature of *tort* for the alleged violation or neglect of a common law duty of a Director, which arose out of his relation to the Bank. The two actions have nothing in common and nothing in the *Bowerman* case sanctions the joining of two such actions.

In a suit by a National Bank Receiver to set aside a preferential payment made to one creditor who is not entitled to it, the action is brought *solely for the benefit of the creditors of the Bank.* The stockholders of the Bank or the Bank itself have no interest or concern in the transaction, for it makes no difference either to the stockholder or the

Bank itself whether one creditor receives the whole of his claim to the prejudice of other creditors, or not. If the payment is made to a bona fide creditor of the Bank, then so much of the assets of the Bank as were used to make the payment have satisfied a debt of the Bank, and that is all that the Bank or its stockholders are interested in. The creditors of the Bank, however, occupy a different position. If one creditor is preferred, every other creditor must take less in the pro rata distribution of the Bank's assets after liquidation, so that the only parties interested in this suit, brought by the Receiver, are the *creditors* of the Bank who did not participate in the preference. A recovery by the Receiver in a suit such as the one at bar will not change the financial status of the Bank. For while more funds will be available for pro rata distribution, the Joint Company which before was not a creditor of the Bank will, after it makes restitution, be a creditor to the exact extent of the recovery. Nor will a recovery add anything to the assets of the Bank which will be available to the stockholders. Consequently this suit on behalf of the Receiver is brought solely and only for the benefit of the creditors of the Bank. Ekstrom, as a Director of the Bank, owed absolutely no duty to the creditors of the Bank, unless it should be held by this Court that upon insolvency or approach to insolvency the assets of the Bank became a trust fund in the hands of its Directors for the benefit of the creditors. If there is any charge in the Bill of Complaint in this case stating a cause of action against Ekstrom, it is contained in the second paragraph of the prayer of the Bill (R. 5), which is as follows:

> "That upon a hearing of this Bill, it may be found and decreed by the Court that said Eric S. Ekstrom occupied a dual and confidential relation with relation to the said Manufacturers National Bank and the said Mechanics Universal Joint Company, a corporation, and that he used information which he gained in confi-

dence at a meeting of the Directors of said Bank, to the wrongful benefit and advantage of the said Mechanics Universal Joint Company, a corporation."

If Ekstrom owed any duty to keep in confidence his knowledge concerning the affairs of the Bank, he owed that duty not to the creditors of the Bank, but to the Bank itself or its stockholders. He owed that duty, if at all, by reason of the fact that he had been chosen as the Director or agent of the Bank. It did not affect the Bank or its stockholders in the slightest to divulge this information, if it was confidential, to a creditor, even though the creditor was thereby enabled to obtain a preference, because so much of the assets of the Bank, as were involved in the payment, were used to pay off and discharge a legitimate debt which the Bank owed to the depositor. On the other hand, the payment did affect creditors. But Ekstrom, the Director, did not owe any duty to the creditors which could be the foundation of a tort action. If, therefore, this action was brought by the Receiver for the sole benefit of the creditors not participating in the so-called preference, then the Receiver, acting for the creditors, could not complain of the violation of a duty which Ekstrom as Director owed, not to the parties who would be benefited by the judgment, but which he owed, if at all, to parties who were in no way injured or damnified by his divulging the so-called confidential information.

Had this been a suit such as was involved in the *Bowerman* case, in which the Receiver was suing for the *benefit of the Bank,* to have restored *to the Bank* assets which had been dissipated by the negligence of the Directors, then a different situation would arise. Then there we would have a breach of a duty which the Director owed to the persons for whose benefit the Receiver *was bringing the action.* We have no such situation in the case at bar. The sole object of the Bill in the case at bar is to set aside and declare void

an alleged preferential payment and to restore that payment to the assets in the hands of the Receiver so that other creditors of the Bank would profit. In a suit such as was before this Court in the *Bowerman* case, the action was brought for the benefit of the *Bank* itself *and its stockholders* to recover for a breach of a duty which the Officers and Directors of the Bank, as agents thereof, owed *to the Bank* itself *and its stockholders* by reason of their agency, and which breach of duty *caused damage to the Bank,* the one to whom the duty was owing. That case is so dissimilar to the case at bar that the holding by this Court in the *Bowerman* case that a common law breach of duty could be joined with a statutory breach of duty, because in that case both duties were owed by the Defendant to the Plaintiff, is no authority in this case.

Just what then, is the status of a Receiver of a National Bank, and what right has he to the property and choses in action of the Bank, and who does he represent when he brings a suit to disaffirm a prior preference?

A Receiver of a National Bank, appointed by the Comptroller, is a mere Trustee for the creditors (*Scott* v. *Armstrong,* 146 U. S. 499, 36 L. Ed. 1059). He takes no greater right in the property than the insolvent Bank itself possessed, except that as representative of the creditors he is clothed with the right to disaffirm transactions of the Bank in violation of law and in fraud of the rights of creditors (53 C. J. 325, and cases there cited)—*a right which the Bank could not itself exercise* (*Dent* v. *Ferguson,* 132 U. S. 50, 33 L. Ed. 242; *Randolph* v. *Howard,* 67 U. S. 585, 17 L. Ed. 269; *Wheeler* v. *Sage,* 68 U. S. 1 Wall. 518 (530), 17 L. Ed. 646). If the *Bank* sought to exercise such a right, the maxim *in pari delicto portior est conditio defendentis* would bar relief and would close the Courts to it, for it is against the policy of the law to relieve either party, as

against the other, from the consequences of their own misconduct. It follows then, that, as the Receiver in this suit brought this action as a representative of the creditors, and for their sole benefit, his action, so far as it is founded, not on the Statute, but as an equitable action to disaffirm and set aside an alleged unlawful preference in aid of creditors, when he bottoms his action upon alleged tortuous acts of Ekstrom, as Director of the Bank, he must aver

(1) the existence of a duty on the part of Ekstrom to protect the *creditors* from wrong;

(2) failure of Ekstrom to perform that duty; and

(3) injury to the creditors *from such failure of Ekstrom.*

In the Bill of Complaint, Respondent charged, after alleging that a meeting of the Directors was held on June 12 at which Ekstrom received information that the Bank was about to collapse, then alleges, that Ekstrom left said meeting, and immediately thereafter, having such knowledge and information, and because of such information, caused the check in question to be executed and caused the withdrawal to be made (See Paragraph 3 of Bill of Complaint, R. 3, 4, 5). If any cause of action is stated in said Bill of Complaint which is founded upon any common-law liability, separate and apart from the statutory liability provided by R. S. 5242, it arises because of the above allegations of fact, and the conclusion of law asserted by the pleader in the first four lines of Paragraph 4 of the Bill of Complaint (R. 5) and in the second prayer of the Bill (R. 5). The conclusion of law as set forth in Paragraph 4 of the Bill is:

> "That said action of said Eric S. Ekstrom, as aforesaid, in addition to the fact that it was done under information which he had acquired in a confidential relation with said Manufacturers Bank", etc., "was done contrary to the provisions of R. S. 5242."

The second prayer to the Bill has been heretofore quoted.

It is quite apparent that the theory of Respondent as revealed by his pleadings, as to the so-called common-law right of the Plaintiff to disaffirm and set aside this alleged unlawful preference, was the asserted *negligence* of Ekstrom in *using* information which he gained in confidence at a Directors' meeting, *to the wrongful benefit and advantage of the Joint Company.*

That this, and not that the payment was inhibited by R. S. 5242, was the basis of the decree of the District Court, is conclusively indicated by Conclusion of Law No. 4 found by that Court herein. The Court found (R. 193):

> "In view of the knowledge possessed by Ekstrom which he had acquired because of his confidential connection with the * * * Bank, when he drew the check of the Defendant Corporation for $42,761.12, it would be inequitable to allow the Defendant Corporation to obtain the advantage which it would thereby obtain over other depositors by virtue of the knowledge which its President had acquired, as aforesaid."

That this was the real theory of the Circuit Court of Appeals, which induced it to affirm the decree of the District Court, is found in that language of Judge Sparks, heretofore quoted, as follows:

> "But the Bill did not wholly rely upon Section 91" (R. S. 5242) "for a recovery. It also pleaded a charge of common law negligence." (R. 236.)

Now, it is our contention that Respondent, by his pleadings, the District Court by its findings and the Court of Appeals by its affirmance of the decree, on this branch of the case, were in most grievous error.

No cause of action, aside from the alleged statutory cause based upon the asserted fact that the transfer was effected in violation of R. S. 5242, was stated in the Bill, or proved by the evidence. The whole theory of the Respondent and the Courts below that such a cause of action could be founded upon the tortuous or negligent act of Ekstrom *in*

using confidential information he obtained as a Director of the Bank, was an erroneous theory because it is founded upon a premise that has no foundation in the law.

If, Ekstrom, as a Director of the Bank, owed any duty, to keep in confidence facts which he learned at a Directors' meeting, *he owed that duty* to the Bank, not to the creditors. The creditors had no right to, no lien upon and no interest in the assets of the Bank at the time the payment was made. Ekstrom was not a trustee for, or representative of, the creditors when he was acting as a Director of the Bank, irrespective of whether the Bank was solvent or insolvent. Not representing the creditors, he owed no duty *to the creditors* to keep confidential the information he received at a Directors' meeting.

If we assume that Ekstrom received the information in confidence, and if we further assume that he abused this confidence to the advantage of the Joint Company, whose confidence did he abuse? Manifestly, if he owed a legal duty to keep in confidence that which he had learned, *he owed that duty* to his principal, the Bank, and to no one else. He did not owe that duty to the creditors, unless it can be said he was a trustee for or representative of the creditors and that the assets of the Bank were a trust fund in the hands of the Directors for ratable distribution among the creditors (a theory which this Court has heretofore frequently considered and conclusively condemned). If then, Ekstrom owed this duty to the Bank, and the Bank alone, then we fail to see how the Receiver, in a proceeding brought *solely* for the benefit of the creditors, is in a position to criticize Ekstrom for the alleged wrongful violation of a duty owed to someone other than the creditors, much less to predicate a cause of action for the benefit of the creditors founded upon a breach of a duty Ekstrom owed, if at all, *to someone other than the creditors.*

If the information was received by Ekstrom in confidence, and if to *use such information* to the advantage of a depositor was a breach of duty Ekstrom owed to his principal, the Bank, it was not only a breach of duty of which the creditors had no right to complain, but its result was in no way injurious to the Bank, for the result was not a dissipation of assets of the Bank or use of its assets for purposes foreign to the purposes for which it was organized. The result was that the assets of the Bank to the extent of the withdrawal, was used to pay a legitimate debt which the Bank owed to a depositor. The Joint Company, the depositor who received the payment, had the legal right, and an equal right, to make a demand for payment of its deposit so long as the Bank was open and functioning, that any other depositor had, and the Bank was in no way damaged. It cannot be said that the financial position of the Bank was changed by the transaction, because by making the payment it wiped out so much of its debt as was represented by the payment.

If, therefore, the creditors were damaged because Ekstrom violated a confidence it was his duty to keep, they, *nor the Receiver in their behalf*, could base a cause of action thereon, because the duty which Ekstrom violated, if any, was not a duty imposed upon Ekstrom for the benefit of the creditors. He owed them no duty in that respect and they cannot complain because he violated a duty he owed to someone else. In the law of negligence, this is elementary.

Chesapeake & O. R. Co. v. *Mihas*, 280 U. S. 102 (106).

Northern P. R. Co. v. *Adams*, 192 U. S. 440 (450).

National Sav. Bank v. *Ward*, 100 U. S. 10 Otto 195.

If the Courts below were in error in decreeing judgment against the Defendants based upon a cause of action

founded on R. S. 5242, as we hope we have demonstrated heretofore, and if the cause of action attempted to be set up founded upon common law negligence, and irrespective of the Statute, has no existence, for the reasons argued, then it seems hardly necessary to argue that Respondent's cause of action does not exist.

(D)

DID THE COURT ERR IN ADMITTING AND CONSIDERING EXHIBITS 22, 24, 25 (R. 242-254)?

Exhibit 22 is in two parts:

(a) A letter from the Comptroller to the Directors of the Manufacturers Bank dated January 8, 1931;

(b) The Examiner's report of the condition of the Manufacturers Bank as of December 4, 1930.

Exhibit 24 is a letter from the Comptroller to the Directors of the Manufacturers Bank dated May 28, 1931.

Exhibit 25 is the Examiner's report of the condition of the Manufacturers Bank as of May 1, 1931.

It will be noted that none of these Exhibits are authenticated as required by R. S. 884. These Exhibits were objected to when offered (R. 31-32). By assignment of error No. 6 (R. 198) petitioners, in the Circuit Court of Appeals, specifically assigned error as to the admission of the exhibits above enumerated. We would not take the time of this Court in argument as to the claimed erroneous ruling in the Court below in the admission of these exhibits, in a chancery case, were it not for the fact that findings of fact numbers 13, 14 and 15 (R. 189-190) and the conclusion of the Circuit Court of Appeals were based solely upon said exhibits. (R. 236.) It is apparent that the Courts below did consider that evidence as not only material, but controlling in this case, and it is on the basis of those findings

based solely upon these exhibits that the Court below entered the decree in this case and the Circuit Court of Appeals sustained that decree.

The Examiner's reports of the condition of the Manufacturers Bank contained many statements as to the *opinion* of the Examiner as to the value of certain assets of the Bank, *i. e.*, in the recapitulation, certain assets are classified as "slow", "doubtful", "loss probable but not estimated", and "estimated losses" (R. 247 and 253). Under each of these headings appears certain figures of large amounts indicating that, *in the opinion of the Examiner*, $1,036,102.10 of the assets of the Bank on December 4, 1930 were "slow" (R. 243), and on May 1, 1931, that $1,145,201.15 of said assets were "slow". (R. 253.) Under the heading "doubtful loss probable but not estimated" in the report of December 4, appears the figures $462,105.64 (R. 247), and in the report of May 1, 1931, under the same heading, appears $430,821.34 (R. 253). Under the heading "estimated losses" in the December 4 report are the figures $162,877.12 (R. 247), and under the same heading in the May 1 report appears the figure $19,795.80 (R. 253). Neither of these recapitulations state *any facts* upon which the conclusion or the opinion of the Examiner as to the classification of these assets is based. There was no explanation as to what the Examiner intended to convey by the use of the classification "slow". Whether he meant to convey the idea that, in his opinion, such assets *would not be collected* at their respective due dates, whether he meant that the assets so classified were *past due*, whether he intended to mean the assets had been renewed an unreasonable number of times, or whether he simply meant that the assets were *non-liquid* in his opinion, there is no means of telling. If the words used in the classification of the assets had a certain meaning in the science of accounting, or, if the words, by reason of certain regulations

of the Comptroller, had a certain meaning, there is no proof in this Record as to the scientific meaning of these words, or the meaning prescribed in the regulations.

What *facts* formed the basis of the Examiner's opinion that certain assets were "slow", others "doubtful" and for his estimation of "losses", is not revealed by the reports themselves or by extraneous testimony. The recapitulation is simply the conclusion of the Examiner. The heading of the reports, respectively (R. 244 and R. 258), shows that the report is mere secondary evidence of the facts or opinions stated therein for the reports state:

> "The information contained therein is based upon the records and books of the Bank and upon statements made to the Examiner by Officers and employees of the Bank, and on data secured from other sources believed to be reliable, and presumed by the Examiner to be correct." (R. 244 and R. 250.)

There is nothing in the reports, however, to indicate what, that is contained in the reports, was obtained from the books of the Bank, what was obtained from statements obtained from officers and employees, nor what from other sources which the Examiner presumed was true. No proof of any kind extraneous to the reports was offered in explanation thereof.

So that there is no means of determining on what information the Examiner based his conclusions, and for all that is known, the opinions and conclusions of the Examiner as to certain assets being "slow", others "doubtful" and others "losses" may have been based on information not disclosed by the books and records of the Bank, not obtained from statements of officers or employees of the Bank, but may have been based entirely upon "other sources of information", the kind or character of which is not disclosed.

The reports, therefore, were not admissible because

(1) It is apparent on the face of each report that the relevant information therein was simply the opinion and conclusion of the Examiner, and

(2) Those opinions and conclusions were based upon hearsay evidence.

When we come to the letters from the Comptroller to the Directors of the Bank, we find that therein the Comptroller is simply calling to the attention of the Directors *the opinions and conclusions* of the Examiner, and the Comptroller criticizes certain assets, the criticisms being based upon the *conclusions* of the Examiner, and directs the Board to expeditiously collect, reduce and adjust the criticized assets, or to obtain additional security therefor, and to report progress every thirty days, etc.

Now, upon what principle of the law of evidence were these reports and letters admissible in this case? As probative of the facts found by the District Court in findings No. 13, 14 and 15 (R. 189-190-191) the exhibits were not admissible, for they were not only opinions and conclusions, but hearsay, and secondary evidence of the most flagrant character. Yet, it is on the strength of these exhibits, alone, that the Courts below found that the Directors of the Bank "should have known that the Bank was insolvent and that closing was imminent".

Respondent argues that these exhibits were admissible as *notice* to the Directors as a class, and to Director Ekstrom in particular.

Notice of what?

The exhibits did not prove or purport to prove insolvency of the Bank at the time of, or prior to, the payment, in the sense that the value of the assets was less than the liabilities. Manifestly, the fact that an Examiner may believe that certain assets are "slow" or "doubtful" does

not prove these assets uncollectible in a Court of law, nor does the opinion of the Examiner that certain Directors' loans were among the "weakest in the Bank", prove that, to the extent of these loans, the assets are uncollectible.

Then, what did the exhibits amount to as *notice* to the Directors or Ekstrom? It was of no materiality in the case, that we can conceive, that the Comptroller criticized some of the Bank's assets and demanded that the same be collected or further secured. Yet, that is all the *notice* that these exhibits gave to the Directors.

The relevant question in the case was:

Was the Bank insolvent or so close to insolvency that the Directors "contemplated" an act of insolvency at the time the payment was made?

These exhibits do not prove or tend to prove that fact. All that is stated in them that is of even casual interest is that *in the opinion of* the Examiner, re-stated by the Comptroller in his letters, enough of the assets to offset "capital and undivided profits" were either "slow" or "doubtful" or were the "weakest in the Bank".

The Comptroller of the Currency is a high government official. He has been given large powers and is vested with great discretion. His discretion, when it comes to the determination of the insolvency of a Bank, is practically unlimited, and, if and when he, in the exercise of his discretion, certifies to the insolvency of the Bank, that certificate is final, and, in the absence of fraud, conclusive upon the world, including the Courts, and his certificate of insolvency or a certified copy thereof, duly authenticated, would be admissible and conclusive proof of that fact in any Court; but his *opinion* as to the value of certain assets, made in a letter, not sworn to, based entirely upon hearsay testimony, is not only inadmissible in a Court of law, but not probative of any fact therein recited.

An examination of the exhibits aforesaid will disclose that, in none of them, does the Comptroller express an opinion that the Bank was insolvent, and manifestly the Comptroller was of the opinion that the Bank was in a condition to safely keep open and continue business, otherwise he would have closed the same and certified to the insolvency of the Bank at the date of his letter. He did not do this. In none of the exhibits aforesaid does the Comptroller express any opinion with reference to the condition or value of the Bank's assets. He simply calls the attention of the Directors to the opinion that had been expressed by the Examiner that some of the assets were "slow", some "doubtful", some "losses" and some were the "weakest in the Bank". An opinion of a National Bank Examiner as to the classification of assets is not proof that the Examiner's opinion is correct, or is a fact, unless and until the Comptroller, acting upon that information, issues his certificate declaring the Bank insolvent. Then, of course, that certificate of the Comptroller is binding upon the Courts, to the extent that the Receiver's appointment or the cause of his appointment cannot be questioned by a depositor of a Bank.

Cadle, Receiver v. *Baker, et al.*, 20 Wall. 650, 651.

But prior to the issuance of such certificate, an opinion by the Comptroller or an opinion by a National Bank Examiner as to the value of assets or the correct classification thereof, expressed casually in a letter, are mere opinion and conclusion and are not relevant proof of the value or lack of value of said assets. This is a question that so far as we can learn has never been decided by any Federal Court. Under the Statute, as we understand it, a National Bank Examiner has limited visitorial powers of a National Bank. By Section 481 of the Banking Act, a National Bank Examiner has the power to examine a National Bank at

least twice in each calendar year and oftener if considered necessary; and it shall be his duty to make a full and detailed report of the condition of said Bank to the Comptroller of the Currency (R. S. 5240). These reports are only for the Comptroller and for the Bank, and are not public documents, open to the inspection of the public, nor do they have any probative value except as they may convey information to the Comptroller upon which the Comptroller is authorized to control the affairs of the Bank. They are not public documents but confidential documents for the information of the Comptroller only. Any opinions expressed by the Examiner as to the value of assets are merely his personal opinion and are not proof that his opinion is founded upon facts, or is correct. The opinions of the Bank Examiner may be adopted by the Comptroller, and, acting thereon, he may issue his certificate declaring the Bank insolvent, and thereupon he may appoint a Receiver, or he may not, depending upon the Comptroller's discretion in the matter. There is no judicial holding, nor is there any Statute, that the reports of a National Bank Examiner to the Comptroller concerning *his opinions* as to the affairs of the Bank, or the value of its assets, are admissible in evidence or probative that his opinion and conclusion is a fact in a Court of law. The assets of a Bank, to a very large extent, consist of choses in action. All of the assets criticized by the Comptroller were choses in action. The ordinary rule is that the value of assets such as choses in action cannot be proven in a Court of law by an opinion or conclusion of witnesses.

Interstate, etc. Corp. v. *Jewelry Co.* 280 Ill. 116 (122).

People v. *Gould,* 345 Ill. 288 (328-9).

People v. *Clark,* 329 Ill. 104 (110, 111).

Anderson v. *First National Bank,* 6 N. D. 497; 72 N. W. 916.

Atkinson v. *Rochester Printing Co.*, 43 Hun. 167.
Booth v. *Powers*, 56 N. Y. 22.
Ingals v. *Lord*, 1 Cow. 240.
McPeters v. *Phillips*, 46 Ala. 496.
Latham v. *Brown*, 16 Iowa 118.
2 Parsons on Contracts, 471.

If this be true, then the opinion and conclusion of the Examiner is no different from the opinion and conclusion of any other witness. Issues of fact are triable in a Court of law by sworn testimony, not by *ex parte* reports containing mere matters of opinion, unsworn to by a National Bank Examiner and unauthenticated and gleaned from unknown sources of information. We therefore contend that the opinions as to the classification and value of assets expressed in Plaintiff's Exhibits 22, 24 and 25 were inadmissible in evidence for the purposes for which they were used in this case, and for the purposes upon which the District Court based its findings Nos. 13, 14 and 15, and upon which the Circuit Court of Appeals affirmed that judgment.

(E)

DID THE COURT ERR IN DISMISSING THE COUNTERCLAIM?

It will be noted that the defendant Joint Company, by its answer to the complaint, in addition to denying the facts alleged in the complaint, set up as an affirmative defense that the Manufacturers Bank during the period when it received the deposits of the Joint Company of upwards of $150,000, in May and June, 1931, was as hopelessly insolvent to the knowledge of its officers, as it was on June 13, when the payment in question was made, and that it kept said bank open during said period, and by so keeping said bank open, it impliedly represented to the public and to the Joint Company that it was solvent, and that the receipt of said deposits under such circumstances, when it

was hopelessly insolvent to the knowledge of its officers constituted such fraud upon the Joint Company that the title to said deposit never passed to said bank nor, through it, to the receiver; but that the title to the same in equity remained in the Joint Company, and that said title so remained when the bank was taken over by the receiver; that the deposits of the Joint Company which came into his hands were not assets to be distributed to the general creditors of said bank but constituted a trust fund, therefore that said withdrawal of said check, Plaintiff's Exhibit 14, was not a withdrawal of funds rightly distributable by the receiver to the creditors under the National Banking Laws, but it equitably belonged to the Joint Company.

The counterclaim filed by the defendant Joint Company sought to recover from the receiver, on the same basis, the balance of the fund which was in the hands of the receiver as the result of the deposits fraudulently obtained from the Joint Company by impliedly representing, by keeping its bank open for deposits and withdrawals, that it was solvent, when in fact it was not. We concede, in presenting our views on this question, that both this affirmative defense and the counterclaim are inconsistent with the contention, we have heretofore made, that there is no proof in this case that said bank was hopelessly insolvent during the period when the deposits of the Joint Company were made. But the court below found, in effect, that the bank was hopelessly insolvent during the period when the deposits were made, and that its insolvency was known, or should have been known, to its officers at the time it received the deposits; but found that because Ekstrom was President of the Joint Company and at the same time was a director of the bank, his knowledge of the condition of the bank was attributable to the Joint Company, and that therefore the Joint Company was not an innocent depositor and was not misled by the implied representation, by keeping

the bank open, that the bank was solvent at the time it made its deposit.

We deny, as a legal proposition under the facts in this record, that the knowledge Ekstrom had as a director of the bank was attributable to the Joint Company because Ekstrom was its president, in the absence of proof that Ekstrom conveyed to the Joint Company the knowledge which he as a director of the bank acquired. There is no such proof in this record. In fact the exact opposite was proved.

If we have succeeded in convincing this Court, by the argument heretofore made, that the Manufacturers Bank at the time the deposits were made and up to the time it closed its doors on June 13, 1931, was solvent, then we frankly confess that the decree of the Court below dismissing the counterclaim was justified. If, however, this Court should find that, from Exhibits 22, 24 and 25, the Court below was justified in finding that said bank was hopelessly insolvent during the whole period from December, 1930, until the bank closed on June 13, 1931, then we say that the answer set up a full and complete defense not only to the payment of the check in question, Plaintiff's Exhibit 14, but that also the Joint Company was entitled to recover on its amended counterclaim the balance of the deposits in said bank, unless it be true as a legal proposition that the knowledge of Ekstrom as a Director of the Bank was chargeable to the Joint Company because Ekstrom was also President of the Joint Company. We therefore argue these two questions, namely, the affirmative defense made by the Joint Company and its amended counterclaim under one heading.

If the Bank was hopelessly insolvent when the Joint Company deposited, during the months of May and June, the sum of more than $150,000 with the Bank, and if as is found by the Court in Findings of Fact Nos. 13, 14 and 15,

such insolvency was known, or should have been known, to the Officers of the Bank during that period, then the act of the Bank in receiving deposits from the Joint Company to the extent of $150,000 was a fraud upon the Joint Company, if it knew nothing about the insolvency of the Bank. In this case there was proof that cash and the equivalent of cash to the amount of approximately $500,000 came into the hands of the Receiver upon the closing of the Manufacturers Bank. This cash was augmented by the amount of the deposits made by the Joint Company. It is a well established principle of law that, when a Bank has become hopelessly insolvent, and its Officers know it to be so, it is a fraud to receive deposits of checks from an innocent depositor ignorant of its condition, and he can reclaim them or their proceeds.

St. Louis Ry. Co. v. *Johnson,* 133 U. S. 566; 33 L. Ed. 683.

Quinn v. *Earle,* 95 Fed. 728.

Richardson v. *New Orleans Coffee Co.* 102 Fed. 785.

Brennan v. *Tillinghast,* 201 Fed. 609.

Fidelity and Deposit Co. v. *Kelso,* 287 Fed. 828.

Federal Reserve Bank v. *Idaho Association,* 8 Fed. (2nd) 922.

Marvin v. *Martin,* 20 Fed. (2nd) 746.

By Finding of Law No. 10, the Court below found as follows:

> "The Mechanics Universal Joint Company, through its President, Erick S. Ekstrom, who was also a Director of the Manufacturers National Bank, knew at the time the several deposits were made by it in the Manufacturers Bank, that the Manufacturers Bank was in a precarious and embarrassing financial condition and hence the depositor was not an innocent depositor and no fraud was practiced upon such depositor. The counterclaim cannot be sustained."

It will thus be seen that the Court based this defense to the counterclaim solely upon the ground that the knowledge of Ekstrom was the knowledge of the Mechanics Universal Joint Company; or, to state it another way, that the Mechanics Universal Joint Company was charged with all the knowledge that Ekstrom, its President, had as to the condition of the Manufacturers Bank. This is not the law, as we understand it. Ekstrom's connection with the Manufacturers Bank as a Director thereof was his own private business and it had no connection of any kind or nature with his employment by the Joint Company as its President. The undisputed proof in this case is that Ekstrom had nothing to do, as President of the Joint Company with the deposit of its money in Banks, or with the selection of Banks in which its money would be deposited. There is no proof of any kind or nature in this case that Ekstrom had anything to do with the fiscal affairs of the Joint Company. There is no presumption that the President of a corporation has anything to do with the depositing of the moneys of the corporation. In this case it appears that the Joint Company had a treasurer, Gustafson, and if there is any presumption to be indulged in at all, the presumption would be that it was the treasurer's business to control the deposit of the corporation's funds. Ekstrom, in his capacity as Director of the Manufacturers Bank, was dealing in his own private capacity and in his own behalf and in no sense was he acting within the scope of his employment by the Joint Company in so doing. A corporation is not charged with notice of facts which became known to its President while he was dealing in his private capacity and in his own behalf with third persons.

3 Fletcher on Corporations, Sec. 812.

Where the same person happens to be the agent of two principals, notice to him will not necessarily be notice to both principals. To make it so there must be some duty

imposed upon him to communicate it to the principal sought to be effected.

Meechem Agency, 2nd edition, Secs. 1837, 1838.
Little Red River Levee Dist. v. *Garret,* 154 Ark. 76.

Where a corporation deals with another corporation, of which its Officer is also an Officer or agent, or with a natural person, of whom he is also an agent, it is not chargeable with knowledge of facts possessed by him, if it does not relate to matters within his authority as Officer of the first named corporation or if he is not acting as its agent in the matter.

3 Fletcher on Corporations, Sec. 824, and authorities there cited.

This precise question has been decided by the Circuit Court of Appeals of the Fifth Circuit in the case of *Ohio Miller Mutual Ins. Co.* v. *Artesia State Bank,* 39 Fed. (2) 400.

In announcing the rule of law applicable to this case, the Court said (page 402):

> "If notice is charged to the Plaintiff, it must be through the undoubted knowledge that its President, Aderly, had of any such fraud at the time he participated in the purchase of the certificate of deposit by the Plaintiff from his company, at least to the extent of approving it. Knowledge of an agent is ordinarily notice to his principal. The exceptions to this general rule are two-fold. When the interest of the agent is adverse to that of his principal in such a way as that the agent will be presumed to conceal his knowledge from his principal and not to disclose it to him, the rule does not apply. Also, when the knowledge of the agent is not acquired while acting in the course of his employment for his principal, it does not bind the principal. The principal is not chargeable with notice of facts within the knowledge of his agent, when the latter acquired such knowledge while acting as agent for another. The two exceptions are so well settled as not to require citation of authority."

The proof in this Record shows that the entire capital stock of the Mechanics Universal Joint Company was owned by Borg-Warner Corporation, and that Ekstrom, in the Joint Company, held only a qualifying share. (Trans. 105.) The proof further shows that he owned 500 shares of the capital stock of the Borg-Warner Corporation having a par value of $10 each (Trans. 116) and that he held no stock in any affiliated company of Borg-Warner. His only interest in the Joint Company, therefore, outside of this very insignificant holding of stock in the Borg-Warner Corporation was as a salaried employee, namely, its President.

The findings of the Court below on this question were very inconsistent. The bill of complaint which was being tried in the Court below charged that the information which Ekstrom received at the directors' meeting on June 12 was *confidential* information and such as that it would be a breach of confidence for Ekstrom as President of the Joint Company to reveal to his company; and the bill charges that in violation of this confidence he did reveal the information to his company and the Court, by conclusions of law Nos. 5 and 6, found in effect that he did violate this confidence. Yet the Court holds by conclusion of law No. 10 that Ekstrom because he was a Director of the Bank and also President of the Joint Company should have divulged the confidential information which Ekstrom received as Director of the Bank that the Bank was in financial distress during the time that the Joint Company deposited $150,000 in the Bank. That is, in passing upon and construing the Plaintiff's bill of complaint, in order to render a decree in favor of the Plaintiff, the Court finds that because Ekstrom *violated* a confidence, by revealing confidential information which came to him as a Director of the Bank, the Defendant Joint Company must sufier; and yet when the Defendant Joint Company asserts a right

against the Receiver of the Bank, the Court holds that a Court of equity will *presume* that Ekstrom revealed the confidential information that the Bank was insolvent when the Company of which he was President made deposits therein. If Ekstrom as a Director of the Bank, received confidential information at the Directors' meeting of June 12 that the insolvency of the Bank was imminent, then, manifestly, the information which he had received from the Comptroller's letter to the Officers of the Bank accompanying the December, 1930, report of the Examiner and the May, 1931, report of the Examiner, was equally confidential. Without a scintilla of evidence that Ekstrom violated his confidence on either occasion, the Court below *assumed* that he did violate the confidence imparted to him at the Directors' meeting of June 12, and that he thereby committed such a wrong that the Receiver of the Bank could recover against him as well as the Joint Company, and that he *should have violated* the confidence which he received in December and May from the Comptroller, which undoubtedly would have caused the Joint Company not to make the deposits of $150,000 in the Bank.

In the case at bar the complaint is predicated upon the presumption that Ekstrom, the President of the Joint Company, in acting as a Director of the Bank on June 12, 1931, received confidential information as to the Bank's impending collapse, which confidence in equity and good conscience he should have kept sealed in his own breast, and if he divulged it to the corporation of which he was President, he committed an equitable wrong upon the Bank, and because, the complaint charges, in violation of his duty not to divulge the information to the Joint Company, the Joint Company took advantage of this information and withdrew a substantial amount of its deposit in the Bank, with knowledge of the Bank's approaching insolvency, Section R. S. 5242 is applicable and the withdrawal is thereby avoided.

If the notice Ekstrom received at the Directors' meeting of June 12 was confidential because Ekstrom received it as a Director of the Bank, and if the information was so confidential that for Ekstrom to reveal it would have been a violation of his duty to the Bank, as the complaint charges, then the presumption, in the absence of proof to the contrary, would be that he did not reveal it to the Joint Company. He testified he did not reveal this information to the Joint Company or anyone connected therewith; that he gave no directions to anyone connected with the Joint Company relative to a withdrawal of funds in the Bank. The agent of the Joint Company who directed the preparation of the check and the withdrawal of the money (Stark) testified that he had no knowledge of the condition of the Bank and received no directions from anyone to make the withdrawal and the transfer, but that he did it for the purpose of equalizing the deposits of the company in the various Banks of the City where the Company maintained deposits.

In the face of this uncontradicted evidence, and in the face of the presumption that Ekstrom kept confidential that information which he acquired as Director of the Bank which it was his duty to keep in confidence, and without the slightest evidence that Ekstrom violated the confidence, and with no finding of fact that actual notice was given by Ekstrom to the Joint Company, the Court below found as Conclusion of Law No. 4 that "it would be inequitable to allow the defendant corporation to obtain the advantage which it would thereby obtain over the other depositors by virtue of the knowledge which its President had acquired as aforesaid." We respectfully submit this is equivalent to the Court holding that Ekstrom's knowledge, received when he was acting as a Director of the Bank, was chargeable to the Joint Company, because Ekstrom was its President; that although Ekstrom was bound by ethics, morals, fair dealing or equity not to divulge the confidential informa-

tion he so acquired, and with no proof that he did so, yet it would be inequitable not to indulge in the presumption that he did so, and this because, as the Court below argues, the Joint Company obtained an advantage over other depositors by virtue of the knowledge which its President had acquired when acting, not as its President, but in performance of his own private business as Director of the Bank. We respectfully submit that Courts of respectable authority in this country and England have determined to the contrary.

In 14a C. J., page 491, Sec. 2359, this subject is discussed. It is there said:

> "Where there are dealings between two corporations or between a corporation and an individual through the intervention of a common officer or agent, the question whether the corporation is to be charged with notice of what is known to the agent by virtue of his relation to the other corporation, or to the other party, depends upon the circumstances of each case; if under the circumstances it is his duty to communicate such knowledge, the corporation to which he owes such duty will be chargeable with his knowledge; but, of course, this does not apply to knowledge which he is under no duty to disclose, or which is in the nature of a confidential communication which he is not at liberty to disclose to the corporation."

See also:

Interstate Finance Company v. *Hosch*, 163 S. W. 600.

In Re Marseilles Extension Ry. Co. 6 L. R. 7 Ch. 161.

It is our contention that if the Court in this case was correct in dismissing the counterclaim, the Court was in error in entering the decree on the bill of complaint, and conversely if the Court was justified in entering the decree on the bill of complaint on the ground that the Manufacturers Bank was hopelessly insolvent and known to be such

by its Officers when the withdrawal took place, that on the same proof a decree should have been rendered in favor of the Defendant Joint Company because the Bank was equally hopelessly insolvent when the Joint Company made the deposit of the money which it withdrew by the check in question.

(F)

THE COURT BELOW ERRED IN RENDERING A MONEY JUDGMENT AGAINST EKSTROM.

Regardless of the correctness of the decree against the Joint Company, there was no justification under any law that we are aware of to hold Ekstrom for the amount of the withdrawal on June 13, 1931. This case has its foundation in Section 91 of the National Banking Act. All that section does is to declare void any payment made by the bank under the circumstances described in the section. Ekstrom received none of the money that was realized on payment of this check. It all went to the Joint Company who owned it. If the payment by the bank of this check was void the Joint Company could be held liable because the Joint Company received the payment. There is neither authority in law nor in the statute for holding Ekstrom liable. Consequently the decree as to Ekstrom must be reversed, regardless of the question as to whether or not the Joint Company can be held liable.

The District Court, in the case at bar, decreed that Ekstrom was liable because he took advantage of confidential information he received at a Directors' meeting of the Bank and that he *negligently* used this information to secure for the Joint Company an unlawful preference (Conclusion of Law No. 5, R. 193), and consequently that Ekstrom became liable (Conclusion of Law No. 9, R. 194). Error was assigned upon these conclusions and it was argued to the Cir-

cuit Court of Appeals that there was no justification for a decree against Ekstrom, but the Circuit Court of Appeals did not notice the assignment nor, in its opinion, comment on the same, and it is impossible to determine its reason for holding Ekstrom liable except it is apparent that Court adopted the conclusions of the District Court.

It seems to us that upon the application of the most elementary principles of the law of negligence, that the decree against Ekstrom was erroneous. What duty did he omit to perform which he owed to the creditors of the Bank? What duty did he owe to the creditors?

There can be no question but that, regardless of the question as to whether a National Bank Receiver is the representative of any one but the creditors, and even admitting there may be cases when he is authorized to bring action as the representative of the Bank or its shareholders, yet *this suit* was brought by him as a representative of the creditors alone, the bank had no interest in it and did not profit by the decree, for, if the Receiver collects the amount decreed in this case it will add nothing to the assets of the bank to be distributed to its shareholders, for there is no question but that the Joint Company was a depositor in a commercial account in the bank to the extent of $65,224.30 at the date the check in question was drawn. If the Joint Company was entitled to withdraw the check in question, *i. e.*, if the withdrawal was valid, then, in the distribution of the bank's assets by the Receiver it would be entitled to its pro rata share of $22,463.18, the balance remaining of its deposit after the check of $42,761.12 had been paid. If, however, the withdrawal of $42,761.12 is void, then the Joint Company is a creditor of the bank to the extent of $65,-224.30 and entitled to its pro rata share based on that amount. So that when and if repayment of $42,761.12 is made, while on one side of the distribution sheet there will

be the amount of the check available for pro rata distribution to creditors, on the other side the total amount owing to creditors will be increased to the exact amount. The only effect of the collection of this decree will be that creditors other than the Joint Company will receive a slightly larger pro rata dividend while the Joint Company will receive less than $42,761.12.

It being perfectly manifest that the creditors are the only ones who will benefit in the slightest by this suit, if the Receiver is successful in obtaining a decree, it follows that, in this suit the Receiver stands as the representative of the creditors and no one else.

Not only that, but this is the kind of a suit that the Receiver, as representative of the Bank or its shareholders, could not bring, for it is a suit to set aside an alleged fraudulent preference. Neither a Court of law nor a Court of equity will lend its aid to one who has granted a fraudulent preference to recover back from the recipient of it the amount of the preference. The rule is that the Courts will *not aid a fraudulent* grantor, his heirs, his assigns or his privies, to reclaim or recover from his transferee property transferred in fraud of its creditors, or its proceeds.

Dent v. *Ferguson,* 132 U. S. 50.
Randall v. *Howard,* 67 U. S. 585.
Wheeler v. *Tage,* 68 U. S. 1 Wall. 518.

This, then, being a suit in which the Receiver represents the creditors alone, and one which it would be against public policy for him to prosecute for the benefit of the Bank or its shareholders, the question for determination is,

Can a Receiver recover against a Director of a National Bank, for negligence, unless the negligence charged is an omission or violation of a duty which the Director owed to the party for whose benefit the action is brought?

It is an elementary rule of the law of negligence, that in a cause of action founded on negligence, there are neces-

sarily three elements necessary to the existence of the cause of action, and unless the three elements exist, no cause of action is charged. These elements are (1) The existence of a duty on the part of defendant *to protect plaintiff* from injury; (2) Failure of defendant to perform that duty; and (3) Injury to the plaintiff from such failure of defendant. This rule is so elementary that we content ourselves with citing only

43 C. J. 632, and cases there cited.

Applying this rule to this case, if we be correct in our conclusion that in this suit the Receiver represents only the creditors, and that creditors will be the only ones who will benefit by a recovery, then no cause of action was stated in the complaint, nor proved by the evidence, against Ekstrom, for Ekstrom, neither as Director of the Bank nor as President of the Joint Company, owed any duty to the creditors. If, as Director of the Bank, he owed any duty to keep confidential information that he received at a Directors' meeting, he owed that duty to the Bank, not the creditors, and, consequently, the creditors, nor the Receiver for them, could complain, even though they were damaged, unless the negligence which caused their damage, was the violation of a duty which defendant owed to them. Even though an act or omission may involve a lack of care and thus constitute negligence in the colloquial meaning of the term, it does not follow that a cause of action arises therefrom. To constitute *actionable* negligence there must be not only a lack of care, but such lack of care must involve a breach of some duty *owed to the person* who is injured in consequence of such breach (43 C. J. 631 and cases there cited).

If the Directors of the Bank were trustees for the creditors to the extent that they, as such Officers, held the assets of the Bank in trust for ratable distribution to the creditors in case of the Bank's insolvency, then if Ekstrom as one of

the Directors, neglected to perform that duty or violated the duty, and the creditors were thereby injured, they of course could complain. But the Directors are not such trustees and owed to the creditors no such duty, consequently Ekstrom, one of the Directors, owed no duty to the creditors for whose use the Receiver brought the action, and no actionable negligence was charged or proven against him.

Assuming he violated a duty he owed to the Bank when he took advantage of knowledge which he acquired at a Directors' meeting to assist the Joint Company to a preference, upon what theory could the creditors complain? If the action attempted to be stated against Ekstrom is negligence—and Respondent has always claimed that it was, and the Court of Appeals finds that it was such an action—then Respondent has failed to aver or prove a necessary element of his action, namely, that Ekstrom owed any duty to the creditors, or that they were damaged by reason of the breach of a duty owing from Ekstrom to them.

This rule has not only been stated by innumerable State Courts, but has been repeatedly recognized and approved by this Court.

In the case of *Chesapeake & O. R. Co.* v. *Mihas,* 280 U. S. 102—(106), speaking through Mr. Justice Sutherland, this Court said:

> "And the rule is well established that it is not sufficient for a complainant to show that he has been injured by the failure of another to perform a duty or obligation *unless that duty or obligation was one owing to complainant.*"

The following cases by this Court announce the same rule:

Chesapeake & O. R. Co. v. *Nixon,* 271 U. S. 218.
Northern Pacific R. Co. v. *Adams,* 192 U. S. 440 (450).
National Sav. Bank v. *Ward,* 10 Otto 195.

In Conclusion.

We have presented our views in this case perhaps more fully than the nature of the case justifies, but the law governing preferences to depositors by National Banks, and the construction and application of R. S. 5242, in cases where the Bank has paid a depositor shortly before suspension, is so uncertain that we feel justified in the prolixity of our argument. The pecuniary effect upon petitioners in this case, if the decree is sustained, is insignificant, but the principle involved is big, and the necessity of settling the law is plain and urgent. Whether petitioners are wronged by the decree, or are not, counsel will feel amply rewarded if the law on the subject is clarified and stated by this Court of last resort. It is apparent from the reports of the Federal Courts, that the law on the subject is not well settled. The decisions of the Courts of Appeal in the several circuits are not in harmony and the result is, not only that needless expense is incurred in litigating apparent fraudulent preferences made in the closing days of National Banks; unnecessary and damaging charges of fraud are made by appointees of the Comptroller, which, coming from that source, tend to arouse hatred and hard feelings, but counsel are unable to advise their clients with certainty or accuracy. We respectfully urge that this Court clarify the law and re-state the law in the interest of the public, and reverse the decree of the Court below.

Respectfully submitted,

Samuel R. Kenworthy,
Solicitor for Mechanics Universal Joint Company.

Shelby L. Large,
Solicitor for Grace M. Ekstrom, Administratrix of the Estate of Eric Ekstrom, Deceased.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. [redacted] 17

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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Rockford, Illinois,
Solicitor for A. B. Culhane, Receiver of The Manufacturers National Bank and Trust Company of Rockford, Illinois.

THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Respondent.

BRIEF OPPOSED TO GRANTING WRIT OF CERTIORARI.

In the preparation of this brief we shall endeavor to use same headings as used by the petitioners.

QUESTIONS PRESENTED.

We think the court will obtain an adequate conception the questions presented by a short statement of what s charged in the bill of complaint.

The bill charges not only a violation of statutory duty it charges what might be said to be common law or

equitable liability to repay the amount of the check. This was proper practice. (*Bowerman* v. *Hammer,* 250 U. S. 504.)

The bill charged that Ekstrom was the President of the Joint Company and as such he executed the check by which the funds were withdrawn from the failing Manufacturers Bank; that he knew the bank was in failing circumstances, because, before the check was drawn and before the check was cashed, he had attended a meeting of the Directors of the Bank held June 12, 1931, at which a Bank Examiner had in effect, stated that the affairs of the Bank were in such condition that it was likely that said Bank could not continue in business and could not continue as a national bank with ability to pay its creditors; that it was necessary that steps be taken to save said bank from collapse and that it was discussed in said meeting that it was advisable to endeavor to consolidate said bank with another bank in order to prevent the open insolvency of the Manufacturers Bank and that the Directors at said meeting at which Ekstrom was present, passed a Resolution giving authority to a National Bank Examiner to discuss the affairs of said Bank with any other bank in the City of Rockford with a view of having said bank take over the affairs of the Manufacturers Bank and to receive its assets and assume its liabilities; that it was then and there stated that in the situation which then existed in Rockford and was likely to exist within the next few days, it would be impossible for said Bank to continue to function as a National Bank unless the relief discussed was afforded said Bank. Ekstrom was present during all of the meeting and heard all of the discussion. (R. 3-4.) That Ekstrom as President of the Joint Company possessing the confidential information which he had learned at said meeting of the distress in which said Bank then and there was, caused the transfer of $42,761.12 of the funds of the Joint Company from the Manufacturers Bank to the

Third National Bank and that he caused said transfer to be made because of the information which he acquired at said Directors' meeting. (R. 5.)

It was also charged in the bill that in addition to the fact that the transfer was made under information which Ekstrom had acquired in a confidential relation with the Manufacturers Bank, that said transfer was made in contemplation of the insolvency of the Manufacturers Bank and was made with a view to prevent the application of the assets of the Manufacturers Bank in the manner prescribed by the laws of the United States with reference to National Banks and the distribution of their assets, and with a view to the preference of one creditor, the Mechanics Universal Joint Company, a corporation, of which he, the said Eric S. Ekstrom, was then and there President, to another, and to the other creditors of said Manufacturers Bank, all of which was in violation of the laws of the United States with reference to National Banks and the distribution of their assets upon insolvency.

Issue was joined on the allegations contained in the above bill and the case went to trial upon this branch of it, upon the issues thus joined.

The petitioners filed a counterclaim which set up that there were deposits made by the Joint Company in the Manufacturers Bank from May 6, 1931 to June 6, 1931, at a time when the bank was insolvent, but when it kept its doors open for business, and that the same amounted to a fraud. (R. 15.) There was a motion to strike this counterclaim because it did not contain the necessary element to charge a fraud, which was, that the Officers of the Bank knew at the time they received the deposits that the Bank was insolvent. The motion to strike was sustained, and an amended counterclaim was filed, which charged that at the time the deposits were received "it was knowingly insol-

vent." (R. 24.) A motion to strike this amended counterclaim was allowed and the petitioners filed a second amended counterclaim (R. 222), which set up the fact that at the time the deposits were received the Bank "was knowingly insolvent", and that "the active Officers in charge of, and daily managing and directing its banking business, were aware of and knew, its actual condition of insolvency" at the time the deposits were made (R. 224). To this second amended counterclaim the Receiver filed a reply denying the averments thereof and upon the issues thus joined upon this branch of the case, it went to trial before the Judge of the District Court.

Statement.

(1) The Manufacturers Bank closed its doors Saturday, June 13, 1931, at 1:30 P. M., never to open again. Appellant, Eric S. Ekstrom, was on said day and had been for many years then next last past, a Director of said Bank. He was and had been for some time a member of the Loan Committee. He was also then and there President of the Joint Company and was in the active management and control thereof devoting a large amount of his personal time and attention to the ordinary business of said corporation. On June 12, 1931, M. A. Baty, a National Bank Examiner in the employ of the Comptroller of the Currency, was in Rockford. He arrived in Rockford June 11, 1931, in response to the request of the President of the Rockford Clearing House Association, who was then also President of the Manufacturers Bank. He came because there was trouble in the banking situation in Rockford. The Security Bank was in trouble and was unable to continue in business.

(2) On Friday, June 12, 1931, Baty called a meeting of the Directors of the Manufacturers Bank. It convened in

the banking building of said Bank at 11:00 o'clock A. M. (R. 39.) Ekstrom was present at said Directors meeting. At that time Baty reported that the Security Bank felt it could no longer continue because of the drain on its deposits; that it had entered into a contract with the Swedish Bank for a take-over of its assets subject to final appraisement thereof. In the presence of Ekstrom, Baty told the Directors of the Manufacturers Bank, in view of the continued drain of its deposits the Manufacturers Bank had and were still having, that it would be for the best interests of the banking situation for said Bank to try and arrange some place to take their deposit liability under cover. Various members of the Board stated the Manufacturers Bank could stand on its own feet; they said they could stand any kind of a run that developed. Baty pointed out to them their low cash reserve; he said it was entirely too low for the Bank to weather any continued drain of deposits (R. 39); and that it was his opinion that they would require far greater cash reserve than they had. He also stated that if the Security Bank did not open the next Monday, there would be a very determined run at the Manufacturers Bank, and that whether or not the Security Bank was taken over by the Swedish Bank, there would probably be unrest that morning; that the contract for the take-over by the Swedish Bank of the deposit liability of the Security Bank was subject to appraisal, and if the take-over was brought to a successful conclusion it would happen Monday morning, June 15th. He also said, in his opinion this would create a disturbance among the public, among the depositors of all banks of Rockford; that there undoubtedly would be runs on every bank in town. (R. 49.)

A Resolution was passed authorizing him to discuss the condition of the Manufacturers Bank with any other bank in Rockford, and a letter was delivered to him authorizing it. Baty said he wanted the letter which would be his

authority to go to any other bank in Rockford and discuss the condition of the Manufacturers Bank with the other bank toward carrying out a merger or take-over. (R. 50.) He said if the Security Bank was not taken over by the Swedish Bank or some other bank it would not open for business on Monday morning next, and if the Security Bank failed to open, there will be a run on the Manufacturers Bank. *I don't think your cash reserves are sufficient to withstand a full day's business.* (R. 50.)

In Ekstrom's presence, Baty said to the Directors, the cash position of the Manufacturers Bank was such that if a run took place they would not be able to withstand any undue withdrawals; probably would not be able to withstand the day's business (R. 59-60); and also he said, the cash position was so small that they could not stand an unusual withdrawal on Monday (R. 60-61).

Baty stated to the Directors, including Ekstrom at that time that they could not raise any more cash on their assets and the statement was true. (R. 42.)

(3) With the knowledge gained at that Directors' meeting, Ekstrom left the banking house and went to the office of the Joint Company and there on June 12, 1931, signed a check drawn on the Manufacturers Bank payable to the Third National Bank for the sum of $42,761.12. (There was a claim in both the District Court and Circuit Court of Appeals that the check was written before the meeting, but Ekstrom did not so testify, and the written evidence furnished by respondent was overwhelmingly to the fact that the check was written after the meeting. In this Court the claim seems to have been abandoned. The District Court found the check was written after the meeting. Finding No. 17; R. 191.)

(4) The check above referred to for $42,761.12, drawn in favor of the Third National Bank was received by that

bank through the mail on the early morning of June 13, 1931. That bank added this check to its list of clearings for June 13, 1931, and presented the check through the Rockford Clearing House on said date, and about ten o'clock A. M. (R. 34) it was paid by the Manufacturers Bank through the Clearing House. That the check was received after the original Clearing House list had been made up, is evidenced by the position of the check on the original list. (R. 125-34.) The Bank closed its doors within four hours after this check cleared.

(5) At the same time the above check was written, there were also written by Ekstrom the check of the same company payable to Rockford National Bank for the sum of $35,000.00 drawn on the Security National Bank (a bank he had learned by virtue of his confidential relationship with the Manufacturers National Bank was also in trouble and could not pay its deposits). These checks both traveled together through the company's offices; they were written, signed and put in the mail at the same time. (R. 100.) These two checks were drawn on banks which at the Directors' meeting above mentioned, Ekstrom had learned were in trouble; both were for the purpose of transferring funds from banks which he knew were in trouble to banks which were not then in trouble.

(6) Another Director of the Manufacturers Bank who was a close associate of Ekstrom (R. 108) about eleven o'clock June 13, 1931 caused a transfer of funds belonging to his company to be made by telegraph from the funds of the Manufacturers Bank to a solvent Chicago bank. (R. 111.)

(7) Ekstrom well knew the condition of the bank, for in addition to what was stated to him by the National Bank Examiner as above mentioned, he also knew the following:

(8) The Bank had been examined December 1, 1930, and the Comptroller of the Currency had written the Directors

a letter dated January 8, 1931, in which the precarious condition of the bank was carefully pointed out. Ekstrom had seen a copy of the report of the Examination and had read the letter and testified he was familiar with the contents of the report and that he saw the letter at the time it was received at the bank. (R. 28.) He was present at a Directors' meeting in which the Directors discussed the letter, prepared an answer to it, which he, himself, personally signed. (R. 28.)

(9) The examination of December 1, 1930, was a special examination. In the Report, submitted to the Directors, the estimated losses of the Bank since the last examination were $162,877.12. Doubtful assets with loss probable were $462,105.64. Total slow assets were $1,036,102.10. The Examiner stated that 48 per cent of bills receivable were subject to criticism; that further heavy losses were inevitable. The Examiner stated that the Directors were still borrowing for themselves and for their companies in excess of the Bank's invested capital. (R. 247.) The letter signed by the Comptroller dated January 8, 1930, referred to, "the continued unsatisfactory condition" of the bank. The letter outlined how the loss items and half of the doubtful assets had been handled and showed the organization of Winnebago Securities Corporation and the handling of these items as hereafter set forth. The Comptroller stated to the Directors, "There is much still to be done to put the assets in satisfactory condition." (R. 243.)

(10) Reference was made to Rolling Green Real Estate Subdivision. This was a Subdivision owned as a partnership of three Directors of the Bank. Ekstrom, one of the defendants, who was a director and on the Loan Committee of the Bank; Floberg who was President of the Bank and Director; Olson who was a Director and Vice President of the Bank. This is the same Olson, who, about one hour

and thirty minutes before the bank closed never to reopen, caused to be transferred by telegraph from the assets of the bank, $10,000.00 belonging to a corporation, of which he was President, in substantially the same manner as Ekstrom had done it. (R. 111.)

With reference to Rolling Green, the Comptroller further said, "The loan is greatly in excess of the legal loan limit; that it should be brought within the lawful requirements without further delay." Nothing was done to this loan and it remained in the Bank at its close.

(11) The Bank was examined again on April 27, 1931. A copy of the result of that examination together with a letter of the Comptroller, dated May 28, 1931, consisting of two pages was sent to the Directors of the Bank. The Bank Directors wrote a letter to the Comptroller dated June 9, 1931. The copy of it which was kept in the bank files, was shown Ekstrom on the witness stand. He did not state definitely whether or not he personally signed the letter but stated that if it had been presented to him he would have signed it, and that he might have signed the original.

(12) In the report of examination dated April 27, 1931, it appears the examination consumed the time to May 1, 1931. The estimated losses since the last examination were $19,793.50; the doubtful assets with loss probable, were $430,821.34; (this was after doubtful assets of $400,000.00 referred to in the former report had been removed by way of Winnebago Sec. Corp.); the slow assets were $1,145,-201.17. (R. 253.) (The banks liability on account of checking deposits, alone, was $2,116,109.96.)

(13) The Examiner commented that over 50 per cent of all loans were subject to criticism and that heavy losses were in prospect; also that the "Directors borrowings were still in excess of invested capital. Their lines contained some of the weakest in the Bank. Heavy losses in these lines inevitable."

(Ekstrom at this time owed the bank directly, $53,000.00, with an additional indirect liability of over $31,000.00. R. 53.) The report showed that since the last examination the deposits had decreased $800,000.00.

(14) A copy of the material parts of the letter of the Comptroller dated May 28, 1934, is set out in full in the Findings of Fact of the Court, No. 15. (R. 190-191.)

In this letter last mentioned the Comptroller used the words, "the extremely unsatisfactory condition of assets," and "try to work the Bank out of its present dangerous condition"; also "the bank is faced with potential losses that threaten its solvency."

The evidence shows these reports reflected the true condition of the bank. (R. 54-42.)

(15) In December, 1930, Ekstrom had been a party to a shift or device to take out of the bank $400,000.00 worth of assets which the Comptroller refused to allow the bank to carry longer. (R. 28-29.) This device was the organization of the Winnebago Securities Corporation under the laws of the State of Delaware. The stockholders were Directors of the Manufacturers Bank. It had no capital except that the stockholders raised $98,000.00 in cash. This $98,000.00 in cash was paid to the bank and three notes of the corporation delivered to the bank, cash and notes totaled $397,919.96. For this amount the bank delivered to the Securities Corporation assets of the bank in a like amount which the Comptroller had refused to allow it to carry. The Securities Corporation deposited with the bank the notes received from the Bank, as collateral to the notes of the Securities Corporation. The Securities Corporation had no assets other than the notes purchased from the Bank. The Securities Corporation notes were, one for $50,000.00 due in one year, and another for $125,000.00 due in two years; another for $124,916.96 due in three years from date. Therefore the net result of this shift or device

was, the Bank received $98,000.00 in cash and had no other security than it had before.

(16) At the time last above mentioned, Ekstrom stated he understood if the plan above mentioned was carried out, "the bank could continue operations." (R. 32.)

(17) The Comptroller referred to the device of the organization of the Winnebago Securities Corporation and criticized it by using these words, "The mere changing of the form of losses and doubtful assets to notes of the company with no intention of liquidating them except through salvage from the eliminated assets, which the Examiner states will not be very large, is not a satisfactory manner in which to rehabilitate the Bank and if the notes of the company are not paid promptly when due, it will be necessary for the Examiner to estimate losses on the entire obligation, which would have to be charged off or provided for through assessment against the stock." (R. 190.)

(The stockholders of the Winnebago Securities Corporation were the Directors of the Bank, who already had borrowed in excess of the bank's invested capital, so that the Winnebago Securities Corporation was not in position to pay anything on its notes). (R. 253.)

(18) It was but three days after this letter of June 9, 1931, by the Directors of the Bank to the Comptroller, that M. R. Baty, Bank Examiner, called the meeting of the Directors of the Bank which was held Friday, June 12, 1931 at eleven o'clock A. M. at which time he told the Directors of the trouble in which the Security Bank was and told them the condition of the Manufacturers Bank was such, that it could not hope to continue in business and that it did not have cash reserve enough to withstand one day's run and that such run was expected to occur on the following Monday. The Court found by Finding No. 17, that Ekstrom left this meeting of the Directors and shortly thereafter as

President of the Joint Company executed a check which had the effect of transferring the $42,761.12, in controversy from the failing Manufacturers Bank to the Third National Bank.

Petitioners, in their petition concede the correctness of this finding. The check drawn by Ekstrom as President of the Joint Company did not clear until the next day, Saturday, June 13, 1931, at about ten o'clock A. M. The check itself did not even reach the Third National Bank until on the morning of June 13, 1931. The record shows it did not reach the post office in Rockford from the Joint Company until 6:30 o'clock P. M. June 12, 1931, at which time Ekstrom had all the information contained not only in the statements of the Bank Examiner to the Directors at eleven o'clock A. M., June 12, 1931, but also the result of the reports of examinations and the Comptroller's letters. Regardless of when Ekstrom actually signed the check, the check did not leave Ekstrom's possession until about 6:30 P. M. June 12, 1931; about eight hours before that time, Ekstrom had gained all of the information which he gained at the Directors' meeting at eleven o'clock A. M. of that day. He had then agreed to a Resolution authorizing the Bank Examiner to discuss the affairs of the Manufacturers Bank with another bank with a view to taking over the deposit liability of the Manufacturers Bank.

(19) As heretofore stated the Bank closed its doors never to reopen them at 1:30 P. M. June 13, 1931. On June 16, 1931, the Comptroller of the Currency executed a certificate to the effect that he was satisfied that the Bank was insolvent and unable to pay its just and legal debts. (R. 32.)

(20) The testimony was that there was no substantial change in the Bank's affairs within the last two days that it was open for business except there had been a continued loss of deposits. (R. 109-56.) The only thing that occurred

on the 12th and 13th of June, 1931, that in any way changed the condition of the bank to any extent, was withdrawals of deposits in those two days and a growing unrest of all bank depositors. (R. 64.) At the meeting held Sunday night, June 14, 1931, the Chief Examiner stated to the Directors that the bank was insolvent.

(21) The exact financial condition of the bank and the fact that it could not raise any additional cash to meet demands of its depositors is well shown by the testimony of L. B. Achor. (R. 48-49-69-70-71.) The Examiner had told the bank Directors on June 12th, that there would be a run on the banks as soon as it was learned the Security Bank would not open its doors. The record shows that the Manufacturers Bank lost $72,000.00 in individual deposits Jun 12th. (R. 64.) It also shows that on June 13th, it lost very heavily ($107,175.00) in individual deposits. (R. 64-57.)

(22) In further proof that the Examiner's statement was correct that there would be a run on the banks, the evidence shows that there was in fact a run on the banks on Monday, June 15th, and that the Rockford National Bank itself, which was then a very large institution, lost in deposits on Monday, in excess of $700,000.00. (R. 45.) That bank was then supposed to be impregnable.

(23) There is further evidence of the Bank's actual insolvency at the times above mentioned, which arises from the result of the examination and valuation of the assets of the bank by the joint Committee from the Third National Bank and the Manufacturers Bank. This result was that the capital stock and surplus and reserve accounts of the Manufacturers Bank had all been wiped out and that it took $750,000.00 in addition, to put the assets in such condition that the deposit liability could be assumed by the Third National Bank. This indicated a loss of $1,500,000.00, for the reason that the capital and surplus which had been

wiped out was $750,000.00, and it took new cash in the sum of $750,000.00 or a total as above stated. (R. 67.)

The Bank had borrowed the sum of $156,000.00 of the Federal Reserve Bank and pledged its notes receivable. It had borrowed of the Continental Commercial National Bank of Chicago, $100,000.00, for which it had pledged its notes receivable (R. 44-48); it had previously deposited with the City of Rockford approximately $1,000,000.00 of its notes receivable to secure the City deposit. (R. 44, 49.)

(24) That the withdrawal by petitioners was not in the usual course of business, is evidenced by the fact shown by the testimony, that through the course of many years dealings, petitioners had never transferred funds from the Manufacturers Bank to any other bank by a check of odd figures of dollars and cents. (The transfer check in this instance was $42,761.12.) Their explanation of the fact of odd dollars and cents in the check under consideration, was that when the bookkeeper ordered it drawn he was trying to remember the amount of a deposit he had previously made and to make the check for the same as the deposit. He claims he gave the figures to the stenographer from memory and did not get them exactly right. The deposit had been $44,617.21. (R. 94.) And from the further fact that never before in the history of petitioners had they drawn a check on their checking account in the Manufacturers Bank to their checking account in the Third National Bank. In the Third National Bank they had a payroll account into which at rare intervals they had transferred funds from the Manufacturers Bank, but the transfer was always to the payroll account and never in odd amounts.

(25) Another explanation for drawing the check in question and the other check for $35,000.00 which was drawn for the purpose of transferring funds from the failing Security National Bank, was that the intended purpose was to equalize bank deposits in the different banks, but the record

shows that assuming these transfers to have been made, there would have been in the checking account of the Third National Bank many thousands of dollars more than was usually carried in that account, and there would have been in the checking account at the Rockford National Bank (to which the check on the Security Bank was made payable), many thousands of dollars more than was usually kept in that account. The accounts would have been entirely out of the usual proportion.

A Correction.

On Page 10 of their petition, petitioners say, in attempting to show this court that when the Bank closed, it had available, a half million dollars in cash or its equivalent, that as a part of said amount there was on deposit in the Federal Reserve Bank, the sum of $220,181.21. While it is true such amount was on deposit, and would have been available for use in paying depositors, except for the following: The record shows the Bank had discounted with the Federal Reserve Bank its paper to the extent of $156,000.00, and it was the custom of the Federal Reserve Bank in case of any financial trouble of the borrowing bank, to immediately charge back against the deposit, the amount of the loan. (R. 44 and 48.) So that instead of there being available, $220,181.21 deposited in the Federal Reserve Bank, there would have been, after the loan had been charged against this deposit, only the sum of $64,181.21.

The Facts as to Counterclaim.

The facts in the case are heretofore set out in some detail under the heading "Statement".

Without attempting to here state them, it seems proper to say that while the Directors of the Bank, including Ekstrom, knew the condition of the Bank when they re-

ceived the Comptroller's letter dated May 28, 1931, which was received some time shortly thereafter, and knew the condition of the Bank when the Directors wrote their letter to the Comptroller of June 9, 1931, it was not until at the meeting of June 12, 1931 at eleven o'clock A. M., when the Examiner explained to them the fact that the Bank was in such condition that it could not continue operations, that the Directors and Officers for the first time realized the dangerous situation in which the Bank was. It was within a few hours after this meeting adjourned that Ekstrom signed the check complained about and which resulted in the transfer of funds from the failing bank into a solvent bank, and the evidence shows that no deposits were made in the failing Manufacturers Bank by the petitioners after the Directors' meeting above referred to on June 12, 1931; in fact the record shows (R. 224) that the last deposit was made June 6, 1931, which was three days before the Directors' letter to the Comptroller.

Statutes Involved.

Under this heading in their petition on page 6, appellees have quoted Section 5242 of the Revised Statute. In addition thereto, we quote Revised Statute, Section 5236, (12 U. S. C. A. Section 194), as follows:

> "Sec. 5236.—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make *a ratable dividend* of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association or their legal representatives, in proportion to the stock by them respectively held."

Rulings of the Court Below.

Under this heading complaint is made by petitioners of the ruling of the Court in admitting in evidence the report of the condition of the bank for the period ending December 4, 1930, and the letter of the Comptroller which accompanied the report when it was sent to the Directors of the Bank, and also the copy of the report of examination concluded about May 1, 1931, and the letter of the Comptroller dated May 28th, which accompanied the copy of the report which was sent to the Directors.

The evidence shows that these reports of examination correctly reflected the true condition of the Bank. (R. 54.)

We contend that what Ekstrom, as a Director, ought by proper diligence to have known, as to the general course of business in the Bank he was presumed to have known, but in addition to that, the Reports of examination and the letters from the Comptroller, all of which he saw and understood, brought home to his knowledge specifically the dangerous condition of his Bank, and these, in connection with what was said by the Examiner on June 12, 1931, at eleven o'clock A. M. placed him in full possession of all facts relating to the Bank and which would lead any reasonable man to know that the statements of the Examiner were true, and that the Bank was in such dangerous condition that it could not hope to continue in business.

The facts from which the insolvency of the Bank would result were testified to by the witness Achor (R. 48, 49-69-71); the fact of the insolvency was shown further by the evidence that no change was made in the condition of the Bank on June 12th or 13th, 1931 (the latter date being Saturday), except further losses of deposits in a large sum, amounting to $107,175.00 (R. 57), and that shortly thereafter (there being no further business done by the

Bank), the Comptroller certified that the Bank was insolvent.

The purposes of the documents complained about was to bring home to Ekstrom on Friday, June 12, 1931, knowledge of the precise condition of his bank.

Ekstrom himself said that he knew the Bank was on the special list to be examined every 90 days and that the Comptroller had requested the Directors to report to him every 30 or 60 days, and that the request had been made by the Comptroller, "because he wanted the Directors to become familiar with the situation". (R. 25.)

ANSWER TO REASONS FOR GRANTING THE PETITION.

Petitioners say that the petition should be granted because of the case of *McDonald* v. *Chemical National Bank*, 174 U. S. 610. We direct your attention to the fact that in the statement of that case by the court, it is said that the defendant answered, denying its knowledge of the insolvency of the bank in question, and that on the date referred to, it was informed and believed that said bank was ent' ly solvent and dealt with it and gave it credit as a solvent bank. (Page 612.) The answer also was that all of the transactions were made in the usual course of business *and without knowledge*, notice or belief that the bank was insolvent or in danger of becoming so. (Page 612.)

In the opinion in that case, this Court pointed out the fact that the bill of complaint contained no allegation of any payment made in contemplation of insolvency, or of any payment made with a view to prevent the application of the bank's assets in the manner prescribed in the Statute, or of any payment made with a view to the preference of one creditor to another. (Page 617.)

But in the case at bar, those allegations are all made in

the bill, and there was evidence tending to sustain them. In such vital respect, the allegation and the proofs in the two cases are directly opposite.

In addition, there was no question involved of fiduciary relationship and confidential information gained by virtue thereof.

Petitioners also say that the writ should be granted because of your decision in *National Security Bank* v. *Butler*, 129 U. S. 223. That case was decided solely under Revised Statute 5242. You held from the evidence there was no question of fact to be submitted to a jury (Page 232), and that the transfer was made in contemplation of insolvency because it was made after the bank closed its doors. This court, however, held that it was sufficient under the Statute to invalidate a transfer if it was made in contemplation of insolvency, and with a view to prevent the application of the assets of the bank as prescribed in the Statute, or with a view to the preference of one creditor to another. (Page 231.)

We suggest the decision in the Butler case supports the decision of the Circuit Court of Appeals, in the case at bar.

Petitioners say that the decision in the case at bar is directly in conflict with the decision in *Hayden* v. *Chemical National Bank*, 84 Fed. 874. This case is but the decision of the Circuit Court of Appeals in the case which was afterwards known in this court as, *McDonald* v. *Chemical National Bank*, (174 U. S. 610), above referred to. Hayden was originally the Receiver, and McDonald was afterwards appointed, which accounts for the difference in name of the parties. However, the opinion of the Circuit Court of Appeals emphasizes the facts above referred to in this brief.

It said, "The court below held the alleged preferences

'were received innocently by the defendant' ". And further, "There is not the slightest evidence that the defendant was aware of or suspected the real situation."

Petitioner also claims that because of the decision in *Nelson* v. *Lewis,* 73 Fed. (2d) 521, the writ in the case at bar should be granted. In that case, however, the creditor denied knowledge of the bank's condition, and the court held that the payment was made in the "ordinary course of business", and defined those terms as being "the taking of deposits and paying of withdrawals in the customary manner".

In the case at bar not only did Ekstrom have imputed knowledge, but he had actual knowledge at the time he made the withdrawal. Our contention is that having inside, confidential information which he gained because of the fact he was a Director of the bank, when Ekstrom used that information so acquired which was not so possessed by the other depositors of the bank, he was not acting in the ordinary course of business. That the other directors and its Officers, possessing the same information which Ekstrom possessed, were not acting in the usual course of business, in paying the check drawn by Ekstrom.

In the case at bar Ekstrom drew the check after he had voted to give authority to a Bank Examiner to discuss the affairs of his bank with another bank with a view of having the other bank take over and secure the deposit liability of his own bank. We insist that a court is justified in finding as the lower courts found, that the act of Ekstrom and of the bank were in contemplation of the fact that the bank could not continue business, and if their deposit liability was not taken over by another bank would be forced to suspend.

Petitioner also says the writ should be granted because of the decision in the case of *Rucker* v. *Kokrda,* 68 Fed.

(2d), 73. In that case, however, on Page 74, the court said, "there was no proof and no finding that he had any inside information as to the bank's condition". In the case at bar there was proof of inside information acquired in a confidential capacity, and the District Court found that at the time he drew the check, Ekstrom had inside, confidential information which he had acquired by virtue of his office as a Director. Findings 11, 12, 13, 14, 15, 16, 17, 18, and 19. (R. 188-192.) Conclusions of law, 4, 5. (R. 234, 235.)

I.

What is said under this number by petitioners on Page 16 of their petition is predicated upon the words occurring in the fourth line "to a bona fide creditor". While this creditor may have been a "bona fide creditor", in the sense that it had a deposit in the bank, yet in withdrawing the deposit they took advantage of other depositors who did not have the confidential information which Ekstrom had acquired by virtue of holding a fiduciary relation with the bank. See, Conclusions of Law 4. (R. 234.)

II AND III.

We think the finding of the District Court, sustained by the evidence, and particularly its Conclusion of Law Nos. 8 and 9 (R. 235), differentiate the case at bar from the case supposed under this number on Page 17 of their petition.

IV.

We think counsel misapprehends the facts and the holding of the lower courts thereon. The District Court found not only that Ekstrom, a Director of the Bank, intended to prevent the assets of the Bank from being ratably distributed, but also that the Officers of the Bank, acting with the knowledge of the directors, were placed in a position where they could allow Ekstrom to take advantage of his knowledge, confidentially acquired, and that the act of the Directors and of the Officers in allowing the check to be paid under the circumstances, created a preference, and the parties were presumed to intend the results of their act. And that the act was done in contemplation of the insolvency of the bank. See, Conclusions 5, 6, 7 and 8. (R. 283.)

The respondent respectfully asks the court to deny the writ.

Respectfully,

ROY F. HALL,
Rockford, Illinois,
Solicitor for A. B. Culhane, Receiver, etc.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1935.

No. .....

MECHANICS UNIVERSAL JOINT COMPANY, A CORPORATION, AND GRACE EKSTROM, ADMINISTRATRIX OF THE ESTATE OF ERIC S. EKSTROM, DECEASED,

Petitioners,

vs.

A. B. CULHANE, RECEIVER OF THE MANUFACTURERS NATIONAL BANK AND TRUST COMPANY OF ROCKFORD, ILLINOIS, SUCCESSOR TO L. B. ACHOR, FORMER RECEIVER,

Respondent.

BRIEF.

I.

We respectfully submit to the court that when the facts are considered in the cases cited in this number, on page 20 of the petition, there is no conflict in the decisions of the courts. Each case had a different set of facts, and those facts are different from those in the case at bar.

We submit to the court that the law stated in the following cases is the law which should govern in this case.

EFFECT OF KNOWLEDGE ACQUIRED THROUGH CONFIDENTIAL RELATION.

There was a violation both of statutory duty and common law duty. Where one receives his deposit from a bank, where the bank contemplates insolvency and the person receiving the deposit has acquired information of the facts from a confidential source connected with the bank, or as is sometimes called, "inside tip," the transaction is not in the ordinary course of business and may be avoided as a preference.

American Surety Co. v. *Jackson* (C. C. A. 9th) 24 Fed. (2d) 768-769.

Fed. Res. Bank v. *Omaha Natl. Bank* (C. C. A. 8th) 45 Fed. (2d) 511.

Swentzel v. *Penn Bank,* 147 Pa. 153; 23 Atl. 415, 416.

Lamb v. *Ulrich,* 94 Okla. 240; 221 Pac. 741.

A fraudulent transaction does not change its character by clothing itself in the respectable habiliments of the "ordinary course of business."

Fed. Res. Bank v. *Omaha Natl. Bank* (C. C. A. 8th) 45 Fed. (2d) 511, 519.

In the case last above cited, at page 519, the court said the case was clearly distinguishable on the facts from the case of *McDonald* v. *Chemical Natl. Bank,* 174 U. S. 610.

A clear exposition of the rights of the parties, where a depositor, with confidential information, withdraws his deposit when a bank is about to become insolvent, is contained in the following opinion,—

Rice v. *City of Columbia,* 143 S. C. 516, 536; 141 S. E. 705.

The distinction is clearly made between the rights of one

who *without knowledge of bank's insolvency* withdrew his deposit a day or two before failure, and one who *with knowledge* of insolvency, withdrew his deposit. In the latter case the transaction is subject to be set aside and annulled as in conflict with the statute.

Vann v. *Fed. Res. Bank of Richmond*, 47 Fed. (2d) 786.

First N. B. & T. Co. v. *Manning*, 116 Conn. 335, 164 Atl. 881.

Corbin v. *Mumford*, 148 Fed. 37.

The *Vann* case was cited with approval on another point in,

Hirning v. *Fed. Res. Bank*, 52 Fed. (2d) 382.

Further authority that it is unlawful for officers and directors of a national bank with knowledge acquired in their capacity as such, to withdraw their funds is found in,

Julius v. *State*, 113 Okla. 7; 237 Pac. 605.

Smith v. *McCowan*, 60 S. D. 504; 244 N. W. 891-893.

Smith v. *Tattersfield*, 60 S. D. 466; 245 N. W. 49.

James Clark Co. v. *Colton*, 91 Md. 195.

Directors cannot, *in justice to those who deal with the bank*, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, to elect officers of the bank, and to make declarations of dividends. That which they ought by proper diligence to have known as to the general course of business in the bank they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers, upon the basis of that course of business.

Bowerman v. *Hamner*, 250 U. S. 504-514.

In determining whether insolvent bank, permitting withdrawal on last day it was open for business, intended to give unlawful preference, managing officers held charged with full knowledge of bank's condition.

South Carolina State Bank v. *Stokes*, 169 S. C. 173.

There comes a point in the affairs of a bank which is approaching insolvency, where the assets of the bank become, in the hands of directors, a trust fund for the benefit of all creditors. Undoubtedly this doctrine may be invoked at an earlier time when Directors themselves are dealing with their corporation. See quotation from Judge Seymour Thompson.

15 Fletcher Cyc. Corp., pp. 516-517—note 25.
15 Fletcher Cyc. Corp., Sec. 7469, page 681.
8 Thompson on Corp., Sec. 6153, page 269.

CORPORATION BOUND BY KNOWLEDGE OF ITS PRESIDENT.

Where the President of a corporation *actually acts for the corporation,* it would be a travesty to say his knowledge relating to the very thing which he was doing, would not bind his corporation, however the knowledge was acquired.

21 R. C. L. Page 841, Sec. 22.
3 Fletcher Cyc. Corp., page 71, Sec. 811.
3 Fletcher Cyc. Corp., page 42, Sec. 797.

"There is no other officer or agent to whom notice could have been made with more propriety."

Porter v. *Bank of Rutland*, 19 Vt. 410, 425.

Contemplation of Insolvency.

A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that it will presently be unable to meet its obligations.

First Natl. Bank of Ortonville v. *Andreson,* 57 Fed. (2d) 17, 19.

A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will *presently* be unable to meet its obligations *and will be obliged to suspend its ordinary operations.*

Park v. *Knapp,* 29 Fed. (2d) 547-549.

Browne v. *Stronach,* 7 Fed. (2d) 685.

Referring to officers of a bank, in connection with approaching insolvency, it has been said,—"They doubtless hoped to defer the event indefinitely by concealing the real condition of affairs; *but they took counsel of their hope and not of their judgment* when they contemplated any prolonged postponement."

Park v. *Knapp,* 29 Fed. (2d) 547-549.

"The hopeless insolvency of the bank was within the contemplation of the officers, if they would contemplate it; that they did not, should not, it seems, take the case out of the statute. The insolvency of the bank was before them and with it before them they gave this creditor a preference." This seems to be within the statute.

Brill v. *McInness,* 4 Fed. (2d) 306.

A bank is in "failing circumstances" when in a state of uncertainty as to whether it will be able to sustain itself, depending upon favorable or unfavorable contingencies which in the course of business may occur and over which its officers have no control.

2 Morse on Banks & Banking, page 1034.

Insolvency as applied to banks is defined, as inability to pay its debts in the usual and ordinary course of business.

State v. *Burlingame*, 146 Mo. 207.

A bank is "in contemplation of insolvency" when the fact becomes reasonably apparent to its officers that the bank will presently be unable to meet its obligations and will be obliged to suspend ordinary operations.

U. S. Pipe & Foundry Co. v. *City of Hornell*, 146 Misc. 812; 263 N. Y. S. 89.

A bank is insolvent when it is unable to meet its current obligations as they mature, though its assets may be greatly in excess of its liabilities. While as to an ordinary corporation they are not said to be insolvent, if the entire property and assets are sufficient to meet the liabilities by way of liquidation. This rule does not apply to banks.

Florida Bank & Trust Co. v. *Yaffey*, 102 Fla. 723.

Insolvency within the meaning of Revised Statute 5242, consists in inability to meet obligations in ordinary course as they accrue.

Federal Intermediate Credit Bank v. *L'Herisson*, (C. C. A. 8th) 33 Fed. (2d) 841.

RELATION OF EKSTROM TO THE BANK AND CORPORATION.

The relation of Director to corporation is of such a fiduciary nature that transactions between Board having common members are regarded as jealously by the law as are personal dealings between a Director and his corporation, and where the fairness of such transaction is challenged, the burden is upon those who would maintain them to show their entire fairness; * * * this court has been consistently emphatic in the application of this rule which it has declared, is founded in soundest morality, and we now add, in the soundest business policies."

Geddes v. *Anaconda Mining Co.*, 254 U. S. 590, 599.

IF THERE IS LIABILITY IN THIS CASE THE JOINT COMPANY OF COURSE IS LIABLE BECAUSE IT RECEIVED THE MONEY. BUT EKSTROM, WHO ACTED FOR IT, IS ALSO LIABLE.

Where the element of duress or forced payment *or of knowingly participating in an unlawful act exists,* the rule is, the fact that the relationship of principal and agent exists, does not relieve the agent, whose personal participation made possible the wrong committed. *In such cases both the principal and agent are wrongdoers and may be sued jointly or severally.* This is true even though the Agent did not profit thereby. The act was obviously wrong and the party participating in such a wrong may not exonerate himself by showing that he was acting for another.

Vann v. *Fed. Res. Bank of Richmond,* 47 Fed. (2d) 786, 788.

"The defendant, though acting as [illegible] actively participated in the commission of the to[illegible], and judgment was rightly rendered against both defendants."

First Natl. Bank & Trust Co. v. *Manning,* 116 Conn. 335; 164 Atl. 881, 883.

The reserve bank participated in those transfers * * *; the action of the reserve bank as Agent helped bring about the preference. What the reserve bank did, it did with full knowledge of the insolvency of the Brookings Bank. It was contended that the bank was merely an agent and therefore could not be held liable. The Circuit Court of Appeals held that it was liable notwithstanding it acted as Agent.

Hirming v. *Fed. Res. Bank,* 52 Fed. (2d) 382.

A suit was brought against a bank on the theory that it was liable for a fund by reason of having knowingly participated in a wrongful withdrawal. The Supreme Court of

Arkansas said, "The theory is correct, and if the evidence in the case sustains a finding that appellee bank participated in the wrongful act, the banking commissioner is entitled to recover for the creditors of the defunct bank, the amount of the funds thus wrongfully diverted."

Rainwater v. *Merchants Natl. Bank,* 172 Ark. 284.

It is entirely proper for the court to enter a money judgment and in addition thereto order an individual defendant to pay, and if he does not, to commit him until he does pay.

> "It is a case where the funds of an insolvent concern in violation of the Bankruptcy Act *were appropriated by one occupying a position of peculiar trust toward all the creditors,* for the purpose of settling his own debt, *and to that extent depriving the other creditors of their right to distribution* under the law creating a uniform system of bankruptcy."

Corbin v. *Mumford,* 148 Fed. 47.

This court treated the Bankruptcy law and the National Banking law as of practically the same import.

Rechtor v. *City Deposit Banking Co.,* 200 U. S. 405-418.

THE OBJECTS AND PURPOSE OF REVISED STATUTE, SECTIONS 5242 AND 5236.

The object of the statutes is to secure equal distribution, and to prevent conduct which the officers of the insolvent bank can perceive, in the exercise of reasonable foresight, will prevent the fulfillment of that object.

First Natl. Bank of Ortonville v. *Andreson,* 57 Fed. (2d) 17-20.

The requirement that the assets be divided ratably and proportionately is so strong, that it was held, a law of New York which required that upon liquidation of an insolvent bank, the money of a savings bank on deposit

should have preference and be paid in full, was in contravention of the Act of Congress requiring the proceeds to be ratably distributed. The following opinion goes fully into the purpose of the Act; it shows that even the Statute passed by Congress that all debts of the United States should be preferred, must give way to the general purposes mentioned in the Act, to the end that all funds should be ratably distributed.

Davis v. *Elmira Savings Bank,* 161 U. S. 275.

Section 5236 establishes by Federal law a system of equal distribution of assets of National Banks.

Jennings v. *U. S. F. & G. Co.* 294 U. S. 216, 226.

COUNTERCLAIM.

The burden is on the plaintiff who is seeking to recover from a Receiver of an insolvent bank, a deposit made shortly before the bank closed, to show *that real fraud was practiced upon the depositor, which requires affirmative proof that the bank was actually insolvent when it received the deposit and that its managing officers knew such to be the fact.*

Fidelity & Deposit Co. of Maryland v. *Kelso State Bank,* 287 Fed. 828.

The Circuit Court of Appeals has distinguished between the knowledge which it is necessary to prove on the part of the officers when they are charged with receiving deposits knowing the bank to be insolvent, and the knowledge which must be proven on the part of the officers in order to recover back a deposit.

Fidelity & Deposit Co. of Maryland v. *Kelso State Bank,* 287 Fed. 828.

To give the depositor the right of reclamation, insolvency must have been of such a character that it was mani-

festly impossible to continue business and meet obligations, and that it must have been known to the officers when they accepted deposits.

In re Gubelman, 10 Fed. (2d) 926.

It is held to be a fraud for the bank to receive a deposit *from an innocent depositor ignorant of the bank's condition* when it is known by its officers to be insolvent at the time they accepted the deposit.

3 Michie on Banks & Banking, page 109, Sec. 69.

It must be shown that the officers of the bank knew of its insolvency and received the deposit fraudulently.

William v. *Cox,* 97 Tenn. 555.
Showalter v. *Cox,* 97 Tenn, 547.
People v. *St. Nicholas Bank,* 28 N. Y. Supp. 407.
In re Beers, 28 N. Y. 422.
3 Michie on Banks & Banking, page 110.
Goshorn v. *Murray,* 197 Fed. 407.

Knowledge on the part of the officers cannot be presumed. It must be proven.

Quinn v. *Earle,* 95 Fed. 728.

It must be shown that the officers knew of the insolvency when the deposit was received, *while the depositor did not know it.*

In re Stewart, 178 Fed. 463.

ARGUMENT.

I.

CONFLICT OF DECISIONS.

If we understand the decisions correctly, there is no conflict in them. In each instance, so far as we have been able to find, where a Director acquired confidential information by virtue of his office, that his bank was in trouble, and by virtue of that knowledge, which was not possessed by other depositors, he withdrew immediately before the bank closed its doors, either his own deposit or deposits belonging to others, the Director so withdrawing funds and the person for whose benefit they were withdrawn, have been required to return them to the bank.

The only exception so far as we have been able to find is the case of *O'Brien, Receiver* v. *East River Bridge Co.* 161 N. Y. 539, cited by petitioners on Page 33 of their argument.

This case seems to sustain their contention. It is not precisely on all fours with our case but nearly so. It was decided under the General Corporation Act of the State of New York. The State of New York evidently does not have the same definite, fixed public policy as does the United States as indicated by the statutes cited and in the case of *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, and in *Jennings* v. *U. S. F. & G. Co.* 294 U. S. 216, at Page 226.

The *O'Brien* case seems to stand alone, but it was decided under the law of New York and the Courts of that State may determine what the law of the state is, but a decision of that kind cannot be considered as authority when it leads to a conclusion which is inconsistent with

the system of equal distribution established by the Federal Law. The decision has been differentiated several times by the inferior Appellate Courts of the State of New York and even criticized by some of them. The decision is at variance with the great weight of authority.

If the law is as stated in the *O'Brien* case and one director of the bank may withdraw the deposit of his corporation, then all directors of the bank may withdraw all the deposits of all the corporations in which they are interested. By this process the assets of the bank could be so depleted that the little depositor,—the man without means of obtaining inside information,—the man without influence in the circles of that particular bank, could be completely deprived of his right to share equally in the assets of the bank. The "system of equal distribution established by Federal law," could be completely set aside.

If one director can with confidential knowledge acquired during a fiduciary relation, withdraw a small deposit of his corporation, he could withdraw a large deposit; if one director can withdraw a large deposit, every other director may withdraw a large deposit.

If a director can thus prefer his own corporation by acting for it when the bank is about to fail, then the law of the United States with reference to ratable distribution of the assets of a failing bank, then the public policy of the United States to treat every citizen in every state exactly alike, has been set at naught.

When one contemplates the facts as they appear from the report of the Examiner to the Comptroller, that thirty-one per cent (31%) of all the loans held by the Manufacturers Bank were from Directors and corporations in which they were interested, then one can see that if these same Directors were permitted to transfer from the bank all of the deposits, which the corporations in which they

were interested had in the bank, then the bank would be but a shell. Surely it is not the policy of this Government to permit Directors and corporations in which they are interested, to borrow 31 per cent of all the money loaned by the bank and then when clouds begin to gather, let these same directors withdraw the deposits of the corporations in which they are interested.

We need not go further than the facts in this case at bar to show what might be done. Director Ekstrom withdrew $42,761.12 of his corporation's deposit by a thinly veiled scheme to make it appear that he had done so "in the ordinary course of business," and Director Olson withdrew $10,000.00 of his corporation's money by a more bold scheme. Olson directed it to be done by telegraph. (R. 111.)

It is said on Page 31 of the petitioners' Brief and Argument "Ekstrom had a substantial deposit in the bank in his own name but he did not seek to take advantage of the information which he had received as a director of the bank, to withdraw any of his own money." Why should Ekstrom withdraw his own deposit? He owed the Manufacturers Bank at that time over $50,000.00 direct liability, and over $30,000.00 indirect liability. (R. 53.) This was many times the deposit he had in the bank.

At the same place in their Argument, petitioners say he did not profit by the withdrawal of the corporate funds. We do not know whether or not he profited. The record does not show. If he could withdraw the corporate funds and thus save his company nearly $50,000.00, who knows what profit directly or indirectly might be his. But at any rate, the fact that he did or did not profit is not the test. Ekstrom's act, if approved, tended to prevent the application of the salutary principle, of ratable division of assets.

II.

The case of *Sanford Ford & Tool Company* v. *Howe-Brown Company*, 157 U. S. 312, is cited under this number.

In the absence of a Statute from which a different policy would result, the common law permitted a failing debtor to prefer one creditor to another. But as applied to a National Bank, such policy "is plainly inconsistent with the system of equal distribution established by the Federal laws". (*Jennings* v. *U. S. F. & G. Co.* 294 U. S. 216, at Page 226.)

CONCLUSION.

Under this heading it is stated by petitioners that when the bank closed on Saturday, it closed with the expectation of opening for business on the succeeding banking day, Monday.

The statements heretofore referred to made by the Examiner on June 12, 1931, to the Directors of the bank indicated very clearly the condition of the bank and that the bank would not be able to continue business the next Monday morning, and that between the time it closed Saturday, and Monday morning, it would be necessary in some way to secure the deposit liability. With the condition of the bank as it has been heretofore stated, each director is presumed to know that the bank could not continue in business. At that time the bank passed a Resolution which was seconded by Director Ekstrom, as follows: "That Examiner M. R. Baty be authorized to discuss our condition and assets with any other bank in Rockford toward a sale or merger". The Officers and Directors then gave the Examiner a letter authorizing him as stated in the Resolution. Not only so but the bank appointed a Com-

mittee to represent the Board of Directors in any such negotiations. (R. 127.)

After the short business day of Saturday the bank did no further business. The Comptroller found it was insolvent and could not pay its debts as they matured. There was no change in the last two or three days the bank was open for business except there was continued loss of deposits and a growing unrest among depositors. (R. 109, 56.)

The Examiner immediately discussed the condition of the bank with the Directors of the Third National Bank which was done at the suggestion of Director Olson made at the meeting. (R. 110.) After his talk with the Third National Bank the Examiner reported to the Committee.

Saturday night the Directors of the Third National Bank and the Committee of the Manufacturers Bank spent all night and until seven o'clock Sunday morning in valuing the assets and in an endeavor to protect the deposit liability of the Manufacturers Bank. The negotiations were continued through Sunday and when it was found necessary to raise $750,000.00 in cash before anyone could be found to guarantee the deposit liability of the Manufacturers Bank, and it was ascertained this amount could not be raised, the Directors voted to close the bank and stated the action was "due to frozen and non-liquid assets". (R. 126.) Thus it appears from Friday, June 12, 1931 successive steps were taken, each one of which indicated the bank could not proceed and resulted logically in the Resolution closing it.

Respectfully submitted,

ROY F. HALL,
Rockford, Illinois,
Solicitor for A. B. Culhane, Receiver.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 17.

MECHANICS UNIVERSAL JOINT COMPANY, a Corporation, and GRACE EKSTROM, Administratrix of the Estate of Eric S. Ekstrom, Deceased, *Petitioners*,

v.

A. B. CULHANE, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, etc., *Respondent*.

BRIEF OF RESPONDENT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1936.

No. 17.

MECHANICS UNIVERSAL JOINT COMPANY, a Corporation, and GRACE EKSTROM, Administratrix of the Estate of Eric S. Ekstrom, Deceased, *Petitioners,*

v.

A. B. CULHANE, Receiver of the Manufacturers National Bank and Trust Company of Rockford, Illinois, etc., *Respondent.*

BRIEF OF RESPONDENT.

STATEMENT OF THE CASE.

The Petitioners' statement omits so much that is material to the consideration of the questions presented in this case that Respondent Receiver deems it necessary to make a concise counter statement.

The Manufacturers National Bank & Trust Company of Rockford, Illinois, closed its doors at 1:30 P. M., Saturday, June 13, 1931, and did not thereafter reopen (R. 187). A Receiver was appointed by the Comptroller of the Currency

on June 16, 1931; an assessment of 100 per cent has since been levied against the shareholders (R. 51); the depositors have been paid dividends of 46 per cent (R. 52) and its assets are insufficient to pay claims in full (R. 52).

Petitioner Ekstrom was the $25,000-a-year president and active manager of the Petitioner Mechanics Universal Joint Company (hereinafter designated the "Joint Company"), and had been such for some years prior to the bank's suspension. He owned 500 shares of the Borg-Warner Corporation, which owned all of the stock of the Joint Company, except the directors' qualifying shares. For two years prior to its suspension Ekstrom had been a director of the bank and had been for more than a year a member of its loan committee. On the last day the bank was open and within a few hours of its closing it paid the Joint Company's check in the amount of $42,716.12 which had been caused to be drawn by Ekstrom and was signed by him as president of the Joint Company.

The situation at Rockford, Illinois, prior to the bank's suspension is accurately restated in part in the following extract (R. 232 to 234) from the opinion of the Circuit Court of Appeals (in which we have inserted record references):

> "On the date the bank closed it was, and for some time prior thereto had been, on a special list of the Comptroller of the Currency for examination every ninety days or oftener, of which fact Ekstrom had knowledge. (R. 28, 39) At about eleven o'clock A. M. June 12, 1931, a meeting of the board of directors of the Manufacturers Bank, called by its president at the request of Mr. Baty, a national bank examiner, was held at the bank at which appellant Ekstrom was present and participated. (R. 39) He there learned from Baty that the Security National Bank of Rockford was unable to continue business and had made a tentative contract with the Swedish American National Bank of Rockford, by which the latter was to take over the former, subject to the appraisal of the former's assets by the latter, and if that appraisal were satisfactory the transfer would be made on Monday morning, June 16,

1931. (R. 39-40) Ekstrom was also there informed by Baty that it was the latter's opinion that the cash position of the Manufacturers Bank was extremely low and could not stand a run of one business day, and that he thought a run on all the banks would occur on Monday whether or not the Security Bank was taken over by the Swedish Bank. (R. 49-50) It was there stated by Baty in the presence of Ekstrom that in view of the continued drain of deposits which the Manufacturers Bank had and was still having, it would be for the best interest of the bank to try to arrange to take the bank's deposit liability under cover. (R. 39) Whereupon the board of directors, with Ekstrom's consent, gave Baty written authority to talk over the affairs of the bank with some other Rockford bank with a view to having the latter take it over. (R. 127) At that meeting Ekstrom knew of the contents of the Comptroller's report of an examination of their bank on December 1, 1930, and he was fully acquainted with the Comptroller's letter of January 8, 1931, which accompanied the report. (R. 28) In that report and letter the Comptroller gave it as his opinion that the bank had loans and discounts which were slow assets in the sum of $1,014,167.09; that there were doubtful loans and discounts to the extent of $228,173.34; and that there were losses since the last examination in the sum of $138,789.96. (R. 28) On June 12, 1931, Ekstrom knew that the Comptroller had requested the bank to send him a letter every thirty days indicating its condition. (R. 28)

The bank was examined about April 27, 1931, and a report of it, together with a letter from the Comptroller, was sent to and received by the bank on or about May 28, 1931, and both were examined by Ekstrom. (R. 30) The report disclosed that there were slow assets of $430,821.34, and losses within the last three months of $19,795.50. (R. 250 to 254) It further disclosed that the directors had direct and indirect liabilities in the bank of $559,620.86. (R. 250 to 254) The letter referred to the condition of the bank as unsatisfactory and dangerously threatening its insolvency and it demanded the directors' immediate attention. (R. 248-249)

At the board meeting of June 12, a committee was appointed by the directors to act for the bank in all mat-

ters relative to taking over its affairs by any other bank. (R. 131) Ekstrom left that meeting about noon, and shortly thereafter executed, as president of appellant, the check which is now in controversy, and caused it to be sent by mail late in the afternoon of that day to the Third National Bank of Rockford. (R. 20-21) Accompanying it was a deposit slip directing its deposit in appellant's general account at the Third National Bank. (R. 128) Theretofore, appellant had never transferred money from its checking account in the Manufacturers Bank to its general checking account in the Third National Bank. (R. 96) The check was received by the Third National Bank on Saturday Morning, June 13th, and was included in the clearings of that day. (R. 11) It was paid by Manufacturers Bank on the same morning, which was the last day that bank was open, and the amount thus paid was deposited as ordered by appellant with the Third National.

About the time Ekstrom signed this check he also signed, as president, another check on behalf of appellant for $35,000. drawn by it against its general checking account in the Security National Bank of Rockford, and it was mailed to the Rockford National Bank. (R. 20)

On Saturday night, June 13, a committee from the Third National, and a like committee from the Manufacturers Bank spent the entire night examining the assets of the latter bank. (R. 40-41) That fact was known by Ekstrom and he was present at the time, and he learned at the conclusion of their examination that it would take $750,000 in cash to effect a merger with the Third National. (R. 41) He also knew that that amount substantially corresponded to the capital, surplus and the undivided profits of the Manufacturers Bank.

On Sunday, June 14, the Manufacturers Bank was insolvent, and by resolution of the board its affairs were placed in the hands of the Comptroller. (R. 126) There had been no appreciable change in its condition from June 12, 1931. (R. 57, 64) From June 6 to June 13, 1931, inclusive of both days, the bank remained open and transacted its usual and ordinary banking business, accepting deposits and paying all checks drawn upon and presented to it, and during that time it

was able to and did meet all its obligations as they matured. (R. 192) The court found that prior to the payment of the controverted check, the bank had committed no act of bankrutpcy.' (R. 193)''

It may further be stated that at the time the Manufacturers Bank paid this sum of $42,716.12 on Saturday morning, June 13, 1931, a few hours prior to its suspension, its directors and managing officers knew, or are chargeable with knowledge of the following facts pertaining to or affecting the bank, *in addition to those restated in the Appellate Court's opinion;*

That a banking crisis existed in Rockford, precipitated by the inability of the Security National Bank to continue in business (R. 39, 112); that there was growing unrest among depositors (R. 49, 64); that their bank's deposits had decreased more than a million dollars in the preceding six months (R. 57, 253 corrected 262); that a run on all banks in Rockford, sound or unsound, was inevitable at the commencement of the next business day (R. 43, 49, 60, 109, 111); that their bank's deposit liabilities approximated $4,200,000.00; that its cash position,—cash on hand in the bank $253,240.06, available deposits in all other banks, $132,562.83, total $385,802.89,—was only sufficient to withstand a run of about three hours' duration (R. 45); that the assets of their bank were frozen (R. 126); that practically no assets remained which could be sold or hypothecated to raise additional cash (R. 42, 71) and that their bank had already pledged approximately $1,600,000.00 (R. 44-71) of its prime assets for deposits accepted or loans obtained.

That there was no reasonable hope at the time of the payment complained of that the Third National Bank or any other sound bank could be induced to take over their bank's liabilities without the payment to it of a large additional sum in cash ($750,000) prior to the commencement of the next business day (R. 51); that the owners of their bank were wholly unable to raise such an amount; that the owners of their bank had been required to contribute a substan-

tial amount in cash and notes in December, 1930, to eliminate questionable assets totalling $397,000 and to permit it to continue in operation (R. 32); that the cash then raised was $50,000 short of the amount sought (R. 83-84); and that in the intervening months, despite the vigorous criticism of the Comptroller and the Examiner, the directors had been unable to reduce (R. 46) their large borrowings and those of their companies, totaling $559,620.86, constituting 31 per cent of the bank's total loans, and containing some of the weakest lines in the bank on which heavy losses were inevitable (R. 249).

QUESTIONS PRESENTED.

(1) Did the Mechanics Universal Joint Company receive a preferential payment or withdrawal of $42,716.12 from its deposit account contrary to the provisions of U. S. R. S. 5242 (U. S. C., Title 12, Sec. 91)?

(2) Was judgment properly rendered against the co-defendant, Eric S. Ekstrom, for repayment of said alleged preferential payment, in view of his connection with the bank, the Joint Company, and his participation in the transaction?

(3) Did the Joint Company have a valid counter-claim against the receivership bank for $20,034.12 (the remainder of its deposit balance at suspension), its contention being that the bank, at the time it received deposits from the Joint Company, during the period May 6 to June 6, 1931, was hopelessly and irretrievably insolvent within the knowledge of its managing officers, and that consequently a trust arose from the acceptance of said deposits enabling the Joint Company to recover said deposits or their proceeds?

SUMMARY OF ARGUMENT.

A.

The Record Establishes that this Payment by the Manufacturers Bank a Few Hours Prior to Its Suspension of $42,716.12 Was Contrary to the Provisions of Section 5242 U. S. R. S., 12 U. S. C. 91, and Was Therefore Void.

B.

The Action of Both Courts Below, Giving the Bank Receiver Judgment Against Petitioner Ekstrom, as Well as Against the Joint Company, Should Be Affirmed.

C.

The Counter-Claim of Petitioner, Mechanics Universal Joint Company, Seeking to Recover Its Deposit Balance at Suspension of $20,034.12 Was Properly Denied by the Courts Below for the Reasons That: (1) No Proof Was Made by Petitioner that the Bank Was Hopelessly Insolvent When It Accepted the Joint Company's Deposits During the Period May 6 to June 6, 1931; (2) No Fraud Was Practiced Upon the Joint Company by the Bank in Accepting the Deposits, in that it Made Said Deposits With the Presumed Knowledge of the Bank's Condition Imputed to it Through Its President, Ekstrom; (3) Assuming, for Discussion Only, that Fraud Was Perpetrated and that Consequently a Trust Relationship Arose in Connection With the Acceptance of the Deposits of the Joint Company Between May 6 and June 6, 1931, There Was No Proof of Augmentation of the Bank's Assets Nor Tracing of the Proceeds of the Deposits to the Assets Taken Over by the Receiver.

D.

If the Judgment of the Court Below is Affirmed the Decree of the Trial Court Should Be Modified to Allow Interest at the Legal Rate on the Amount of the Illegal Payment from the Date Thereof to Repayment Without Crediting the Dividends that Would Be Payable on a General Claim as of the Date Paid Other Creditors.

E.

Additional Comments on Petitioner's Brief.

ARGUMENT.

A.

The Record Establishes that this Payment by the Manufacturers Bank a Few Hours Prior to Its Suspension of $42,716.12 Was Contrary to the Provisions of Section 5242 U. S. R. S., 12 U. S. C. 91, and Was Therefore Void.

Title 12, U. S. C. Sec. 91, provides:

> "Transfers by bank and other acts in contemplation of insolvency. All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court (R. S. 5242)."

The bank Receiver contends that the payment complained of was made at a time when the Manufacturers Bank was hopelessly and irretrievably insolvent within the knowledge of its directors and managing officers, or clearly in contemplation thereof, and after the commission of an act of insolvency, and was made with a view to prevent the application of its assets in the manner prescribed by the National Bank Act or with a view to the preference of one creditor to another.

The trial court found that the Manufacturers Bank was insolvent on Sunday, June 14th, and that there had been no

appreciable change in its position since June 12th, *the day before* the payment complained of. This finding is supported by the record (R. 42, 44, 45, 71, 126). The resolution of the directors closing the bank, passed on Sunday, the day following the payment, recites that its suspension was "due to frozen and non-liquid assets" (R. 126). Consequently, the bank's assets were equally frozen at the time of the payment on Saturday morning. The expected runs on Rockford banks *did* occur at the commencement of the next business day; three Rockford banks suspended on that day (R. 64); and the largest bank in the city, The Rockford National Bank (R. 65), lost in excess of $700,000 in deposits on that day (R. 45). The assets of the Manufacturers Bank would have been equally frozen if taken over by the Third National Bank, and no additional cash could be raised thereon, and the advice received on Sunday that the Third National Bank would require an additional cash payment of $750,000 to assume the liability of the Manufacturers Bank merely confirmed what the directors of the Manufacturers Bank must have known at the time of the payment complained of (R. 51). In this connection the following extract (R. 236) from the opinion of the court below (Circuit Court of Appeals) is in point:

> "The court also found that the bank was insolvent on Sunday, June 14, and that there had been no appreciable change in its condition since June 12, the day of the directors' meeting. That finding we think was supported by material evidence and we can not disturb it. It may be true that none of the officers thought it was insolvent, or contemplated an act of insolvency or the closing of the bank, but *in view of the condition disclosed,* and the reports and correspondence from the Comptroller, together with the advice and suggestions of the examiner, we are convinced that the officers and directors should have known that the bank was insolvent and that closing was imminent. We think the court's findings and conclusions, insofar as they bear on this question, were amply supported by the evidence." (Italics ours)

It was the sworn duty of the directors of the Manufacturers Bank, under the provisions of the National Bank Act, to do what they could to conserve the property of this failing or failed corporation for the benefit of its creditors. The directors should have closed the Manufacturers National Bank & Trust Company of Rockford prior to the commencement of business on Saturday, June 13, 1931, its insolvency at that time being hopeless and irretrievable and its open insolvency being a matter of a few business hours. The opening of the bank for the short business day on Saturday resulted in the dissipation of $107,175.00 of creditors funds (R. 57), which should have been conserved, $52,716.12 thereof having been paid to corporations for which directors Ekstrom and Olson acted as agents (R. 111, 191).

Certainly the conclusion is inevitable that directors Ekstrom and Olson knew that the Manufacturers Bank was hopelessly and irretrievably insolvent and that its open insolvency was imminent at the time of the payment complained of, when we examine their acts and the surrounding circumstances rather than their testimony. *The directors' resolution of the day before authorizing National Bank Examiner Baty to negotiate a sale or merger with another Rockford Bank* (R. 127) *was moved by Olson, seconded by Ekstrom and passed unanimously.* At this meeting Ekstrom asked for the bank's cash position and was advised thereof in round numbers by President Floberg (R. 114). The Third National Bank had been suggested (R. 60-110) and Ekstrom knew that if a takeover was consummated the Joint Company's deposit balance would be automatically transferred to the Third National Bank prior to the commencement of the next business day. That Ekstrom had no hope that a takeover could be consummated is clearly evidenced by his action in transferring most of the Joint Company's funds to the Third National Bank prior to the time this result would be accomplished by a sale or merger.

That Ekstrom had no hope that a sound bank could be induced to take over the liabilities of the Security National Bank is likewise clearly evidenced by his act in transferring $35,000.00 (R. 20) of the Joint Company's funds out of that bank to the Rockford National Bank (the largest bank in the city) before the takeover, if consummated, would be effective at the commencement of the next business day. The Joint Company had never before transferred funds from the Manufacturers Bank to its general account in the Third National Bank and it had never before transferred funds to any other bank except in even amounts (R. 96, 191). In his answer (R. 21) Ekstrom "admits that this defendant caused said money to be drawn out". Ekstrom was insolvent, and included in his large indebtedness was approximately $81,000.00 owed the Manufacturers Bank (R. 53). An assessment was levied on his 85 shares of Manufacturers Bank stock after suspension. The Receiver has been unable to enforce collection of this indebtedness except as to $200 or $300 (R. 53) and an offset of $2,445.00 (R. 106). Ekstrom evidently realized that the situation had become hopeless some time subsequent to June 6, 1931, the date on which the Joint Company's deposits ceased, and on June 12th it is obvious that in drawing out the sum of $42,716.12 he acted to protect his principal remaining asset, his $25,000.00 a year salary and his capital investment in the Joint Company. That Olson, also a director and member of the Loan Committee, who owed the Manufacturers Bank upwards of $50,000.00 (R. 112), had no hope that its early open insolvency could be avoided is clearly evidenced by the transfer he made *by telephone* of $10,000.00 of the deposit balance of the Sundstrand Machine Tool Company, of which he was president (R. 111), from the Manufacturers Bank to a strong Chicago bank at about the time the payment complained of in this case was made. The bank Receiver's action to avoid this payment was filed in the trial court (R. 111).

The intent and purpose of the National Bank Act is stated by this court in *National Bank* v. *Colby,* 21 Wall. 609, 612:

> "The act of Congress prescribes the conditions upon which National banks shall be created; the powers they shall possess; and the consequences of their failure to meet their obligations. *All persons dealing with these institutions can only acquire and enforce rights against them under the limitations there designated.*
>
> * * * * * * * * *
>
> (613) "*As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank.* The fiftieth section provides for the appointment of a receiver of an insolvent bank, who shall take possession of its assets, collect its debts, and upon the order of a court of record, sell its real and personal property and pay over the money to the treasury of the United States, *subject to the order of the Comptroller of the Currency;* that the comptroller shall then advertise for creditors to present their claims against the association, and after making provision for refunding to the United States any deficiency in redeeming its notes, *shall make a ratable dividend of the money on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction.*
>
> "The fifty-second section, *further to secure this equality, declares* that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or 'with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void.'
>
> "*There is in these provisions a clear manifestation of a design on the part of Congress:* 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank;

and, 2d, *to secure the assets of the bank for ratable distribution among its general creditors.*" (Italics ours) (Statutes printed p. 8 and Appendix p. 51)

The directors of the Manufacturers National Bank, including Ekstrom, subscribed to the oath prescribed by 12 U. S. C. 73 (Appendix p. 52) which provides in part: "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association and will not knowingly violate or willingly permit to be violated any of the provisions of this title".

THE PAYMENT COMPLAINED OF WAS MADE IN CONTEMPLATION OF INSOLVENCY.

In *National Security Bank* v. *Butler*, 129 U. S. 223, 229, 230, the act found to be a violation of 5242 U. S. R. S., occurred after the directors had voted "(1) to go into liquidation; (2) that the bank be closed to business; (3) that the president, two directors, and another person be a committee to go to Washington and confer with the Comptroller of the Currency as to the measures proper to be taken, and that if the Comptroller should deem it necessary to appoint a receiver," the bank's cashier was recommended for that position. (Page 230, opinion)

This court said (page 231):

> "*It is sufficient, under 5242 of the Revised Statutes, to invalidate such a transfer, that it is made in contemplation of insolvency, and either with a view to prevent the application of the assets of the bank in the manner prescribed by chapter 4 of title 62 of the Revised Statutes, or with a view to the preference of one creditor to another.* Certainly, the transfer in question was made in contemplation of insolvency, made as it was after the directors had voted that the bank should go into liquidation, and should be closed to business, and that a receiver should be appointed; and it was made with a view, on the part of the Pacific Bank and of its

cashier, who represented it and acted for it in this transfer of its assets, to prevent the application of its assets in the manner prescribed by such chapter 4 of title 62, and with a view to prefer the Security Bank to other creditors. The transaction, if allowed to stand, could result in nothing else. The statute made it void, —although there was no such view on the part of the Security Bank in receiving the transfer of the assets; and although there was no knowledge or suspicion at that time on the part of the Security Bank that the Pacific Bank was insolvent or contemplated insolvency, or was not doing business, or that its directors had voted to close it, or that application was to be made for a receiver; and although the transfer took place before the application was actually made to the comptroller for the appointment of a receiver." (Italics ours)

Both courts below held in the instant case that the payment was void because made in contemplation of the bank's insolvency. Had the directors of the Manufacturers Bank performed their sworn duty to protect the interests of creditors, they would have applied for the appointment of a receiver prior to the opening for business on Saturday, June 15. The fact that they did not do so seems immaterial.

We submit that *National Security Bank* v. *Butler, supra,* applies by analogy to the instant case, in that the resolution of the directors the day before authorizing the national bank examiner to negotiate for a sale or merger, was in legal effect a vote that the bank go into liquidation and be closed to business, and was an admission that the rights of creditors became fixed at that time. If it be suggested that the national bank examiner should have closed the bank prior to the opening for business on Saturday, we answer that Section 5242 U. S. R. S. would be violated by any payment made after the rights of creditors had attached to the bank's assets whether the payment be made by the bank's directors or officers or by an examiner, conservator or receiver, performing duties under the National Bank Act.

In *Smith* v. *Baldwin* (Court of Appeals, D. C.) 69 Fed. (2nd) 390, 391, an assistant cashier of the Commercial National Bank of Washington, D. C., withdrew from that bank on the last day it was open for business, deposit balances to his credit as executor and trustee. Despite the fact that Smith was not a director or general officer of the bank, restitution was required on the theory that the bank was in contemplation of insolvency and the statute had been violated. In its opinion the Apellate Court said, at page 391:

> "While the evidence also shows that Smith was not a director or general officer of the bank and likewise that he attended none of the meetings preliminary to the bank's closing, it would nevertheless require more credulity than we possess to accept Smith's statement he did not know the closing of the bank was imminent * * * * * The evidence shows quite clearly that the directors of the bank in surrendering possession realized that unless they should be permitted by the officers of the Treasury to refuse payments on demand, they must surrender. When permission was refused, they immediately turned the bank over to the Comptroller. This alone was evidence of insolvency, for, as the Supreme Court said in McDonald v. Chemical National Bank, 174, U. S. 610, 619, 19 S. Ct. 787, 790, 43 L. Ed. 1106, 'the taking possession of the bank by the comptroller of the currency is a distinct declaration of insolvency.' In Roberts v. Hill (C. C.) 24 F. 571, 573, it is said: '*A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations.*' See, also, First National Bank v. Andresen (C. C. A.) 57 F. (2nd) 17, and many cases cited there. Here the fact was made certain a month later by the Comptroller's order requiring stockholders to respond to a 100 per cent call.
>
> *Nothing therefore, remains to be considered but the single question whether under the facts shown here Smith withdrew the money in contemplation of the bank's insolvency.* As we have seen, he denies this in the petition filed by him, though he did not himself

testify in the trial. In his petition his explanation is 'he became apprehensive that all banks in the District of Columbia might close' and consequently 'to protect the interests of the beneficiaries of the estate' of which he was executor he withdrew the money. *That the effect of what he did, if we should permit it to stand, would be to protect them and enable them to obtain a preference over other depositors is perfectly clear, and it seems to us equally clear to let it stand would be to disregard the plain mandate of the statute.* We have no doubt Smith's action in the withdrawals of the estate money and of his infant children's was prompted by proper motives, but that the impelling cause was his knowledge that if he delayed the funds would be put in jeopardy by the closing of the bank we think is clearly proved. * * * *The purpose of the statute is to enforce equality of division among all creditors.* The purpose may be defeated in the case of withdrawals by a depositor in the ordinary course of business at any time prior to the closing of the bank, *but a different rule prevails in the case of one who with knowledge of impending disaster seeks to prefer himself.* See Vann v. Federal Reserve Bank (D. C.) 47 F. (2nd) 786, 788, where it is said that *if knowledge of the impending closing of a bank is given a depositor 'as a result of which he is enabled to withdraw his deposit, the effect of such a withdrawal would be to create a preference in his behalf, voidable and recoverable under the express terms of the statute.'*

Smith, though without responsibility for the policy of the bank, was in charge of one of its important departments. *He saw as clearly as any officer or director the steady undermining of public confidence in its stability and the continuous drain on its resources. The atmosphere of the place was surcharged with impending disaster, and his act shows he sensed it fully and sought in his own interest to avoid it. This the statute condemns.''* (Italics ours)

The unreported memorandum of conclusions and order for judgment of the United States District Court, Southern District of California, Central Division, in the case of *N. F.*

Schilling, Receiver, The United States National Bank of Los Angeles, v. *A. Sieroty,* dated August 21, 1934, and printed in the appendix (page 53) finding a transaction to be a violation of Section 5242, U. S. R. S., supports the bank Receiver's contentions in this case.

In *Uhl, Receiver of the Grand Rapids National Bank* v. *First National Bank & Trust Company of Kalamazoo,* which supports our contentions, unreported (appendix p. 59), decided February 15, 1935, and holding Section 5242 U. S. R. S. was violated, the District Court for the Western District of Michigan, Southern Division, Raymond, J., said (p. 59):

> "The parties are in accord upon many of the important facts, and recognize the fundamental principles of law applicable thereto, as stated in Nelson v. Lewis, 73 F. (2d) 521, 523—'If the financial condition of a bank is such that an actual act of insolvency is imminent, and the officers of the bank know or ought to know this condition, a payment to a creditor or depositor is void if not made in the ordinary course of business; an intent to prefer is presumed under such conditions, and as a rule the creditor and depositor need not know of the imminency of the act of insolvency. National Security Bank v. Butler, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 682; Federal Reserve Bank of Kansas City v. Omaha Nat. Bank (C. C. A.) 45 F. (2d) 511; Parks v. Knapp, 29 F. (2nd) 547 (C. C. A. 8); American Surety Co. of New York v. Jackson, 24 F. (2d) 768 (C. C. A. 9); Brill v. McInnes, 14 F. (2d) 306 (C. C. A. 8).'"

A bank is in contemplation of insolvency when the fact becomes reasonably apparent to its officers that the concern will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations.

First National Bank of Ortonville v. *Andresen,* 57 Fed. (2d) 17, 19.
Parks v. *Knapp,* 29 Fed. (2d) 547, 549.
Browne v. *Stronach,* 7 Fed. (2d) 685, 687.
U. S. Pipe & Foundry Co. v. *City of Hornell,* 146 Misc. 812; 263 N. Y. Supp. 89, 95, 96.

In referring to the bank's officers in *Parks* v. *Knapp, supra,* the court said:

> "They doubtless hoped to defer the event indefinitely, by concealing the real condition of affairs; but they took counsel of their hope and not of their judgment when they contemplated any prolonged postponement."

In *Brill* v. *McInnes,* 14 Fed. (2d) 306, the court said:

> (p. 307) "The hopeless insolvency of the bank was within the contemplation of the officers, if they would contemplate it; that they did not, should not, it seems, take the case out of the statute. The insolvency of the bank was before them and with it before them they gave this creditor a preference. This seems to be within the statute."

If the financial condition of the bank is such that the officers knew or ought to have known that insolvency was imminent, then a payment to a depositor is void if not made in the ordinary course of business; *an intent to prefer is presumed under such conditions even though the depositor did not know the imminency of the insolvency.*

Nelson v. *Lewis,* 73 Fed. (2d), (C. C. A. 2) 521, 523.

Also see:

Federal Reserve Bank v. *Omaha National Bank,* 45 Fed. (2d) 511, 515.
Roberts v. *Hill,* 24 Fed. 571, 574.
Browne v. *Stronach,* 7 Fed. (2d) 685, 687.

Where one receives his deposit from a bank which contemplates insolvency, and he has acquired information of the facts from a confidential source connected with the bank, *the transaction is not in the ordinary course of business and may be avoided as a preference.*

Fed. Res. Bank v. *Omaha National Bank* (C. C. A. 8th), 45 Fed. (2d) 511, 515; (Certiorari denied 283 U. S. ~~901~~ 902).

The case of *Vann* v. *Federal Reserve Bank of Richmond, supra,* is not unlike the instant case and the court there distinguishes the facts presented from the case of *McDonald* v. *Chemical National Bank,* 174 U. S. 610.

Ordinary Course of Business.

One of the important questions for determination in this case is whether, under the facts here presented, the payment complained of was made in the ordinary course of business because the bank, at the time, was meeting the demands of other depositors who had no information concerning its condition. The bank Receiver contends that this payment was not in the ordinary course of business because it was actuated by Ekstrom's knowledge of the bank's insolvency. Payments by a bank in the ordinary course of business without knowledge on the part of the customer that the bank is insolvent cannot be attacked under the illegal preference section but a different rule applies to one who with knowledge of the impending disaster seeks to prefer himself or his principal. The rule we contend for is stated by Mr. Justice Groner in speaking for the Appellate Court in *Smith* v. *Baldwin, supra,* and as a District Judge in *Vann* v. *Federal Reserve Bank,* where he said:

Smith v. *Baldwin,* 69 Fed. (2nd) 390, 392:

> "The purpose of the statute is to enforce equality of division among all creditors. The purpose may be defeated in the case of withdrawals by a depositor in the ordinary course of business at any time prior to the closing of the bank, *but a different rule prevails in the case of one who with knowledge of impending disaster seeks to prefer himself.*" (Italics inserted.)

Vann v. *Federal Reserve Bank of Richmond,* 47 Fed. (2nd) 786, 787:

> "The Reserve Bank, however, insists that, notwithstanding all that is said above, the payment of the

checks in question was not a preference because it was a payment in the ordinary course of business, and was in all respects analogous to the payment of checks of depositors made in the ordinary course, but after the insolvency of a bank and with knowledge of the same on the part of its officers. Whatever rights a receiver of an insolvent bank may have against a depositor of the bank, who without knowledge of its insolvency withdraws his money a day or two before failure, it is not necessary here to decide, *but there can be no doubt, I think, that, if there be added to the facts stated in the foregoing proposition knowledge on the part of the depositor of insolvency, the transaction, even though apparently in the ordinary course of business, would be subject to be set aside and annulled as in conflict with the statute,* for if, as sometimes happens, knowledge of the impending closing of a bank is given a favored depositor as a result of which he is enabled to withdraw his deposit, the effect of such a withdrawal would be to create a preference in his behalf, voidable and recoverable under the express terms of the statute." (Italics inserted.)

In *American Surety Company of New York* v. *Jackson* (C. C. A. 9), 24 Fed. (2nd) 768, 769, Larson was cashier of the bank and treasurer of the City of Payette. Just prior to suspension Larson withdrew the sum of $4322.77 to the city's credit, placed the funds in a sack and transferred the sack to another bank. It was held the transaction violated the illegal preference section.

Thus it appears that the knowledge of the depositor concerning the bank's condition and how he acquired that knowledge is important in determining the question of whether or not the transaction was in the usual course of business. Where the depositor occupies a fiduciary relation to the bank and thus acquires knowledge of its condition, his act of withdrawal of depositary funds is not in the ordinary course of business.

Aycock v. *Bradbury* (C. C. A. 10th), 77 Fed. (2d) 14, 17;

First National Bank of Ortonville v. *Andresen* (C. C. A. 8th), 57 Fed. (2d) 17, 19;
Federal Intermediate Credit Bank of Omaha v. *L'Herisson* (C. C. A. 8th), 33 Fed. (2d) 841, 846, 847.

In *Federal Reserve Bank* v. *The Omaha National Bank* (C. C. A. 8th), 45 Fed. (2d) 511, 518, 519, the transaction occurred while the bank was open but the beneficiary had knowledge that the bank was insolvent, and the payment was held void under Section 5242 U. S. R. S.

In the case of *George* v. *Wallace,* 135 Fed. 286, 295, the Circuit Court of Appeals, 8th Circuit, said:

> "The expression 'usual course of business', as one of limitation upon the powers of a corporation is generally referrable to the activities of a going concern *and has little if any application to one which is upon the threshold of liquidation because of insolvency.*" (Italics inserted.)

We therefore submit that the facts in the instant case require the application of the foregoing rule to the payment to the Joint Company now under consideration, and the affirmance of the Trial Court's conclusion of law No. 9 (R. 194), which reads:

> "(9) The funds of the Mechanics Universal Joint Company were not transferred from its checking account in the Manufacturers National Bank and Trust Company in the usual and ordinary course of business."

The Payment Was Made After the Commission of An Act of Insolvency.

While this record establishes the soundness of the conclusion of both courts below that the payment complained of was made in contemplation of insolvency, we submit that it can also be held that the bank was hopelessly and irretrievably insolvent at the time of the payment and that prior thereto it had committed an act of insolvency. The

directors of the Manufacturers Bank were the agents of its shareholders to conduct a banking business and were without power to cease operations or to sell the assets to another bank *unless* such action was necessary to protect the interests of creditors. To quote from *City National Bank of Huron* v. *Fuller* (C. C. A. 8), 52 Fed. (2nd) 870, 873:

> "*It is the duty of directors of a failing corporation to do what they can to conserve the property for the benefit of the creditors.* If a concern is in fact a going concern, the board of directors ought not to be permitted to strike it down by selling all its assets. The situation is entirely different when the corporation is not a going concern, and a corporation on the verge of insolvency is not going far.
>
> "In George v. Wallace, 135 F. 286, this court pointed out that the expression 'usual course of business' has reference to a going concern and not to a concern on the threshold of insolvency. The rule is stated in 3 Thompson on Corporations, 2429, as follows: '*Where the corporation is in failing circumstances, or is in fact insolvent, the directors and managing officers may dispose of all the property, or make an assignment of all the corporate property for the benefit of creditors.*' (Citing authorities.)
>
> "These cases hold that under general law, in the absence of restrictions national or state prohibiting it, directors of corporations may under certain circumstances mortgage or pledge the corporate assets; may make an assignment for the benefit of creditors; may throw the corporation into bankruptcy. While most of them do not involve National banks, they discuss the general powers of boards of directors under circumstances analogous to those presented here, and we think they are applicable in considering the question of what is the 'ordinary business' of the banking corporation. Under the National Banking Act section 24(7), Title 12, U. S. C. A., directors are given 'all such incidental powers as shall be necessary to carry on the business of banking.' Such business includes the meeting of the bank's liabilities.
>
> "We do not think section 181, title 12, U. S. C. A., has any application here, as there was no voluntary dissolu-

tion of the corporation we are dealing with, and said section is applicable only to a solvent bank. Planten v. National Nassau Bank, 174 App. Div. 254, 160 N. Y. S. 297; Planten v. Earl, 220 N. Y. 677, 116 N. E. 1070.

"It has become something of a custom of National banks to take over other banks in failing circumstances, and this has received the approval of the Comptroller of the Currency. If the transaction is a fair one, it is in the public interest. This court in Schofield v. State National Bank of Denver, Colorado, 97 F. 282, held the taking over of the assets and the assumption of liabilities of another bank was within the power granted to directors of National banks by section 24(7), title 12, U. S. C. A., supra. In construing a transaction between two National banks in First National Bank v. Harris, 27 F. (2d) 117, 124, this court said: 'It was an out and out sale of assets in consideration of an assumption of liability with an accounting over for any surplus realized.' (Citing authorities.)

"Without further discussion, we may say that in our judgment the transaction between the First National and the City National was not, in view of the approaching insolvency of the City National, ultra vires." (Italics ours)

The trial court found, in effect, that the Manufacturers Bank was insolvent on June 12, 1931. We submit that the resolution of the banks Board of Directors passed on that date, moved by Olson and seconded by Ekstrom, was in legal effect an admission by the board of directors that the rights of creditors had attached. The situation is not unlike that presented to the Circuit Court of Appeals for the Third Circuit in *Port Newark National Bank* v. *Waldron*, 46 Fed. (2nd) 296, where an attempt was being made to effect an assumption of liabilities just before a bank suspended and wherein the court held that the rights of creditors attached when the Bank Examiner's activities commenced and before the Receiver was appointed, stating:

(page 297): "In pursuance of such appointment, Peterson, immediately took possession of, and closed, the bank. It thus appears that the Comptroller,

through his bank examiner, was engaged in supervising the bank on August 7th, and, when advised the proposed sale could not be effected, immediately appointed a Receiver. *It is clear that on August 7th, and from then on, the Comptroller was exercising his supervisory powers, and had assumed direction and control of the affairs of the bank with reference to its proposed sale.*" (Italics inserted)

(page 298): "From the above it will be seen that on and from August 7th the Comptroller was, first by his bank examiner and later by his receiver, performing the duties of supervision and possession vested in him by Federal law and that his receiver was 'the agent and officer of the United States' in possession of the bank and its assets."

(page 299): "Sufficient to say that in the present case we regard the Comptroller at the time this bill was filed as having complete dominion over, and, by his bank examiner, full legal control of, the then and future operations of the bank, and that such situation might ultimately require the appointment of a Receiver."

We submit that under the above authorities the court below could have held, and this court can now hold, *that the resolution of the Board of Directors of the Manufacturers Bank, passed the day before the payment, authorizing the bank Examiner to negotiate a sale or a merger was an act of insolvency and that consequently the rights of creditors attached to the bank's assets as of June 12, 1931.*

Weight to Be Given Concurrent Findings of Facts by the Two Courts Below.

It is settled that this court will not disturb findings of fact made by a District Court in equity, concurred in by the Circuit Court of Appeals, except in cases of clearest error. *Charleston, S. C., Min. & Mfg. Co.* v. *United States*, 273 U. S. 220, 223; *Page* v. *Rogers*, 211 U. S. 575, 577. In its finding of fact No 22 in this case (R. 192) the trial court said: "On Sunday, June 14, 1931, said bank was in fact insolvent

and there had been no appreciable change in its condition from June 12, 1931." Referring to this finding the Appellate Court said in its opinion (R. 236) "That finding, we think, was supported by material evidence and we cannot disturb it."

What is designated by the trial court as a conclusion of law will be treated on review as a finding of fact if essentially of that character. 4 C. J. 645. The trial court's conclusions of law 8 and 9 (R. 194) are:

> "(8) The directors of the bank knew its condition to be as found above and placed its officers in position to pay the check in question, drawn by one possessing knowledge of the bank's condition which he acquired because he held a confidential position in the bank and thereby learned facts not known to depositors generally. The payment of the check in fact created a preference and it must be held in law the parties intended the result of their acts.
>
> (9) The funds of the Mechanics Universal Joint Company were not transferred from its checking account in the Manufacturers National Bank & Trust Company in the usual and ordinary course of business."

The conclusion of law No. 5 (R. 193) recites that in causing the check to be drawn and paid, Ekstrom "then and there intended to prefer the defendant corporation over the other creditors of said bank and intended to prevent the assets of said bank from being distributed ratably, and that his act in so doing was in violation of Section 5242 of the Revised Statutes of the United States, and was an act done in contemplation of insolvency of said Manufacturers Bank."

We submit that the trial court found as a fact that the payment complained of was made in contemplation of insolvency and after the bank had become insolvent and that this finding of fact was concurred in by the Appellate Court in the following excerpts from its opinion (R. 236):

> "It may be true that none of the officers thought it was insolvent, or contemplated an act of insolvency or

> the closing of the bank, but in view of the condition disclosed, and the reports and correspondence from the Comptroller, together with the advice and suggestions of the examiner, we are convinced that the officers and directors should have known that the bank was insolvent and that closing was imminent. We think the court's findings and conclusions, in so far as they bear on this question, were amply supported by the evidence. * * * It would serve no good purpose to set forth the evidence in detail. A perusal of the entire record convinces us that with respect to both appellants, the court's findings are supported by direct material evidence as well as by logical and legitimate inferences."

We submit that this court should not disturb the trial court's findings of fact in this case concurred in by the Circuit Court of Appeals.

B.

The action of both courts below giving the bank receiver judgment against petitioner Ekstrom as well as against the Joint Company should be affirmed.

Petitioner Ekstrom, as a director of the Manufacturers National Bank subscribed to an oath which provided "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association and will not knowingly violate or willingly permit to be violated, any of the provisions of this title." (Appendix, p. 52.) The bill of complaint, paragraph 4, (R. 5) alleges that Ekstrom's action "* * * was in violation of the laws of the United States with reference to national banks * * *." In addition to the specific duties defined in the National Bank Act a director of such a bank is under a common law obligation to the depositors as well as the shareholders to exercise at least ordinary care and prudence in the supervision and administration of the bank's affairs (*Bowerman* v. *Hamner*, 250 U. S. 504, 512, 513). The bank Receiver contends that

Ekstrom knowingly violated the National Bank Act, or willingly permitted it to be violated incident to the payment complained of; that he did not diligently administer the affairs of the bank and that he was negligent in the performance of his duties, which made him personally liable for the loss sustained by the bank, and justified the personal judgment rendered against him in this case by both courts below.

The bill of complaint in this case is drawn to meet the above propositions. It is correct pleading, for this court has said:

> "And there is no sound reason why a bill may be not so framed that, if the evidence fails to establish statutory negligence but establishes common law negligence, a decree may be entered accordingly, and thus the necessity for a resort to a second suit avoided." *Bowerman* v. *Hamner, supra;* p. 511. Also see: *Briggs* v. *Spaulding,* 141 U. S. 132, 142, 165.

As stated in the opinion of the court below, in the instant case:

> "But the bill did not wholly rely upon section 91 for a recovery. It also pleaded a charge of common law negligence. That this is a proper practice cannot be doubted. Bowerman v. Hamner, 250 U. S. 504." (R. 236.)

The object of the statute is to secure equal distribution, and to prohibit conduct which the officers of the insolvent bank can perceive, in the exercise of reasonable foresight, will prevent the fulfillment of that object.

> *First National Bank of Ortonville* v. *Andresen,* 57 Fed. (2d) 17-20.

Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them.

> Bowerman v. Hamner, 250 U. S. 504, 514.

In determining whether an insolvent bank payment, withdrawn on the last day it was open for business, was intended to give an unlawful preference, the managing officers are held charged with full knowledge of the bank's condition.

South Carolina State Bank v. Stokes, 168 S. E. 541, 544.

It is the duty of a bank director to keep in touch with the general affairs of the bank, and where the bank is in failing condition over a period of months, and the director has full opportunity to observe that condition, he will not be heard to say that he did not do so. Hatfield v. Lamb, 185 S. E. 229, 230.

In Robinson v. Hall, (C. C. A. 4) 63 Fed. 222, 228 it was said:

> "If directors are depositors, and know two months or more before suspension that that event is inevitable, and that the bank can pay only a percentage of its deposits, and yet check for the whole of their own balances, thereby diminishing the percentage to which other creditors would be entitled, they certainly defraud, to the extent of the diminution, the creditors whose interest they are relied upon to protect, and should be held to strict accountability."

THE RELATION OF EKSTROM TO THE BANK AND THE JOINT COMPANY.

> "The relation of Director to corporation is of such a fiduciary nature that transactions between Boards having common members are regarded as jealously by the law as are personal dealings between a Director and his corporation, and where the fairness of such transaction is challenged, the burden is upon those who would maintain them to show their entire fairness; * * * this court has been consistently emphatic in the application of this rule which it has declared, is founded in soundest morality, and we now add, in the soundest business policies."

Geddes v. *Anaconda Mining Co.*, 254 U. S. 590, 599.

Where a Clearing House was the agent and fiduciary representative of all the banks forming the Clearing House, this court referred to the Clearing House as "the fiduciary agent of the banks."

Yardley v. *Philler*, 167 U. S. 344, 359.

Where the President of a corporation *actually acts for the corporation*, it would be a travesty to say his knowledge relating to the very thing which he was doing, would not bind his corporation, however the knowledge was acquired.

21 R. C. L. Page 841, Sec. 22
3 Fletcher Cyc. Corp., page 71, Sec. 811
3 Fletcher Cyc. Corp., page 42, Sec. 797

"There is no other officer or agent to whom notice could have been made with more propriety."

Porter v. *Bank of Rutland*, 19 Vt. 410, 425

Where two attorneys and agents of a corporation purchased at a sale property for the corporation, this court said, "They and the company may both be considered as purchasers at the sale."

Minnesota Co. v. *St. Paul Co.*, 69 U. S. 609, 634

Where the element of duress or forced payment *or of knowingly participating in an unlawful act exists*, the rule is, the fact that the relationship of principal and agent exists, does not relieve the agent, whose personal participation made possible the wrong committed. *In such cases both the principal and agent are wrongdoers and may be sued jointly or severally.* This is true even though the agent did not profit thereby. The act was obviously wrong and the party participating in such a wrong may not exonerate himself by showing that he was acting for another.

Vann v. *Fed. Res. Bank of Richmond*, 47 Fed. (2d) 786, 788:

> "The defendant, though acting as agent, actively participated in the commission of the tort, and judgment was rightly rendered against both defendants."
>
> *First Nat'l Bank & Trust Co.* v. *Manning,* 116 Conn. 335; 164 Atl. 881, 883.

In *Hirning* v. *Fed. Res. Bank,* 52 Fed. (2d) 382-387, it was contended that the bank was merely an agent and therefore could not be held liable. The Circuit Court of Appeals held that it was liable notwithstanding it acted as agent, and in that connection said:

> "The Reserve Bank participated in those transfers • • •; The action of the Reserve Bank as agent helped bring about the preference. What the Reserve Bank did, it did with full knowledge of the insolvency of the Brookings Bank."

A suit was brought against a bank on the theory that it was liable for a fund by reason of having knowingly participated in a wrongful withdrawal. The Supreme Court of Arkansas said, "The theory is correct, and if the evidence in the case sustains a finding that appellee bank participated in the unlawful act, the banking commissioner is entitled to recover for the creditors of the defunct bank the amount of the funds thus wrongfully diverted."

Rainwater v. *Merchants Nat'l Bank,* 288 S. W. 388, 389.

C.

The counter-claim of petitioner, Mechanics Universal Joint Company, seeking to recover its deposit balance at suspension of $20,034.12 was properly denied by the courts below for the reasons that: (1) No proof was made by petitioner that the bank was hopelessly insolvent when it accepted the Joint Company's deposits during the period May 6 to June 6, 1931; (2) no fraud was practiced upon the Joint Company by the bank in accepting the deposits, in that it made said deposits with the presumed knowledge of the bank's condition imputed to it through its president, Ekstrom; (3) assuming, for discussion only, that fraud was perpetrated and that consequently a trust relationship arose in connection with the acceptance of the deposits of the Joint Company between May 6 and June 6, 1931, there was no proof of augmentation of the bank's assets nor tracing of the proceeds of the deposits to the assets taken over by the Receiver.

To establish the right it asserts to receive a priority payment, in any amount, from the assets of the Manufacturers Bank that passed into the hands of the Receiver, the Joint Company must affirmatively prove (1) that the relationship existing was that of trustee and cestui que trust and not that of debtor and creditor, (2) that the deposits in question augmented the assets of the bank and (3) that the proceeds thereof passed into the hands of the Receiver. All doubts must be resolved in favor of the Receiver who is the trustee for the general creditors. Texas & Pacific R. R. Co. v. Pottorff, 291 U. S. 245, 261, Note 19; Schuyler v. Littlefield, 232 U. S. 707, 713; Adams v. Champion, 294 U. S. 231; Cook County National Bank v. United States, 107 U. S. 445, 448.

While the Manufacturers Bank may have been insolvent prior to June 12, 1931, the Bank Receiver submits that it became hopelessly and irretrievably insolvent *for the first*

time on that date. To quote from this court's opinion in Easton v. Iowa, 188 U. S. 220, 232:

> "Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. McDonald v. Chemical Nat. Bank, 174 U. S. 610. But, under the state statute, no such conservative action can be followed by the officers of the bank except at the risk of the penalties of fine and imprisonment. In such a case the provisions of the Federal statute would permit the Comptroller to withhold closing the bank, and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law."

Notwithstanding the frozen condition of the assets of the Manufacturers' National Bank and Trust Company and the losses from time to time sustained, finding of fact numbered 23 of the trial court (R. 192) indicates *that up to June 12, 1931,* the bank had been transacting its usual and ordinary banking business and had been meeting its current obligations from time to time as they accrued. Assuming, for discussion only, that the bank was actually insolvent prior to June 12th from the standpoint of the balancing of the fair value of its assets against its total liabilities, it should be observed that it is only when the bank is hopelessly and irretrievably insolvent that it becomes wrongful for it to accept deposits in regular course of business. See *Easton* v. *Iowa, supra,* page 232; *St. Louis Railroad Company* v. *Johnston,* 133 U. S. 566, 577; and *Quin* v. *Earle,* 95 Fed. 728, 732. No proof was adduced by petitioner indicating that the bank was hopelessly and irretrievably insolvent (as

distinguished from asset insolvency) during the period May 6 to June 6, 1931, in which the deposits sought to be recovered were accepted by the bank.

The situation of the Manufacturers' Bank became acute when the banking crisis arose in Rockford, precipitated on June 12, 1931, by the inability of the Security National Bank to continue in business (R. 39-112) and the inability of the Manufacturers' Bank,—by reason of its small cash balance compared to its outstanding liabilities,—to meet the run which was expected to occur on Monday, June 15th, and which did occur on June 15th, on the remaining banks (R. 64, 65); and further the inability of the Manufacturers' Bank to arrange for a take-over by the Third National Bank (R. 51).

Of course, when the Manufacturers' Bank became unable, whether by reason of the banking crisis, or by reason of its progressively precarious condition, to meet demands which might be made upon it as a banking corporation, it became insolvent in law. A banking corporation differs from other corporations and individuals so far as the status of insolvency is concerned. Other corporations and individuals are insolvent only when their assets are insufficient to meet their liabilities (in contemplation of bankruptcy and insolvency laws), whereas banks are considered insolvent when they are unable to meet their current demands, and the demands of their depositors over the counter, notwithstanding they may have frozen assets, which, together with their other assets, may equal their liabilities. As stated in Steele v. Randall, 19 Fed. (2) 40, 41:

> "Insolvency is a condition unaffected by intentions or hopes of the persons affected. When the bank could not meet its obligations as they became due it was insolvent."

Also see United States v. Oklahoma, 261 U. S. 253, 261.

Even though this court should not accept the conclusion of both courts below that the counterclaim should be dis-

missed on the theory that no fraud was practiced on the Joint Company in that it was not an innocent depositor by reason of the knowledge and acts of its president, we respectfully suggest that it is unnecessary for this court to determine the relationship between the Joint Company and the Manufacturers' Bank with reference to the deposits complained of *because the record contains no proof that any of the deposits augmented the assets of the bank or that any part of the proceeds have been traced into the hands of the Receiver.* Mr. Justice Parker, speaking for the Circuit Court of Appeals for the Fourth Circuit in Poole v. Elliott, 76 Fed. (2nd) 772 summarizes the law applicable at page 774:

> "And, even if the bank were hopelessly and irretrievably insolvent at the time of the receipt of the deposits, this fact would not give preferential status to the claim of the depositor. It is true that the acceptance of a deposit under such circumstances is a fraud on the depositor, for which he may rescind the contract and recover the deposit or ask that a constructive trust be declared in his favor upon its proceeds. St. Louis & S. F. R. Co. v. Johnston, 133 U. S. 566, 10 S. Ct. 390, 33 L. Ed. 683; Quin v. Earle, (C. C.) 95 F. 728, Illinois Cent. R. Co. v. Rawlings (C. C. A. 5th) 66 F. (2nd) 146. But before such trust will be enforced against a receiver, who represents creditors as well as the bank, *it is indispensable that clear proof be made that the trust property or its proceeds has gone into a specific fund which has come into his hands, or into a specific identified piece of property, or has directly augmented a fund upon which the trust is to be declared. It is not sufficient to prove merely that it has gone into the general estate and has presumably increased its amount and value.* Edisto Nat. Bank of Orangeburg v. Bryant (C. C. A. 4th) 72 F. (2nd) 917; Santee Timber Corporation v. Elliott (C. C. A. 4) 70 Fed. (2nd) 179, 93 A. L. R. 874; Swan v. Children's Home Society (C. C. A. 4) 67 Fed. (2nd) 84; Lifsey v. Goodyear Tire & Rubber Co. (C. C. A. 4th) 67 F. (2nd) 82; Harmer v. Rendleman (C. C. A. 4) 64 F. (2nd) 422. *Here there was neither allegation nor proof tracing the proceeds of the deposits by*

petitioner into the hands of the receiver; and, on the authority of the cases last cited, we must deny relief to petitioner even if we construe the prayer of his petition as sufficiently broad to ask that a trust in his favor be declared and not merely that his claim be granted preferred status." (Italics ours.)

If the Joint Company's deposits between May 6th and June 6th, 1931, were accepted under conditions of known insolvency so were those of all depositors made during that period and the cash that passed to the Receiver would be insufficient to pay such claims. To again quote Mr. Justice Parker in the Poole case (p. 775):

"* * * it is clear that other depositors as to deposits made during this period are entitled in equity to the same relief as petitioner, and in granting relief the court should see that their rights are protected. In such cases, therefore, the establishment of a trust in favor of depositors on the ground of hopeless and irretrievable insolvency would affect a large part of the obligations to depositors and probably all of the cash assets passing into the hands of the receiver; * * *"

The Joint Company alleges (R. 14, 15, 21) that it "made deposits of its money and of its checks and bills of exchange." Under the record all of the deposits might have consisted of checks drawn on accounts already in the Manufacturers Bank, the payment of which would result in mere transfers of bookkeeping credits and a general claim. Old Company's Lehigh v. Meeker, 294 U. S. 227, 230; Blakey v. Brinson, 286 U. S. 254, 263. If any of the checks deposited were drawn on outside banks and collected through credits with correspondent banks no proof is made that the proceeds passed to the Receiver. As stated by this court in Adams v. Champion, 294 U. S. 231, 239: "Evidence is lacking that it was withdrawn in such a form or for such purposes as to be represented by any assets forming part of the estate today." The record contains no proof that any cash con-

tained in the deposits was not dissipated before the Receiver arrived. The amended counterclaim (R. 25) does allege that $400,000 in cash passed to the Receiver but absolutely no proof is made that this fund contained one penny of the proceeds of any of the Joint Company's deposits. The bank Receiver submits that the denial of the counterclaim should be affirmed for the reasons stated by the courts below but in any event because of the Joint Company's complete failure to prove augmentation and tracing of funds to the Receiver.

D.

If the judgment of the courts below is affirmed, the decree of the trial court should be modified to allow interest at the legal rate on the amount of the illegal payment from the date thereof to repayment without crediting the dividends that would be payable on a general claim, as of the date paid other creditors.

The facts and circumstances of this case require the bank Receiver, acting as trustee for depositors, to urge this court to modify the decree of the trial court with reference to interest, to permit the Receiver to recover the full amount of the payment, plus interest thereon at the legal rate from June 13, 1931, to repayment, without crediting the dividends paid creditors, as of the dates paid, as was done by the trial court, but permitting the Joint Company to now prove its general claim and receive dividends thereon, without interest, its failure to receive the dividends heretofore paid being due exclusively to its delay in presenting the general claim.

The trial court's conclusion of law No. 3 (R. 193) reads: "The plaintiff is entitled to a decree as prayed for in the bill." The bill of complaint (R. 6) prays:

> "That said defendants and each of them, be ordered and directed by this court to return to the plaintiff said sum of $42,761.12, together with interest at the rate of

5 per cent per annum from said June 13, 1931, to the date said fund is returned to said Receiver."

The trial court's decree (R. 195) allows the appellant's credit for the dividends as of the dates paid and contains the following paragraph:

"It further appears to the court that four dividends have been ordered and have been paid on general claims, by the Receiver, and that the amounts to which the defendants would be entitled on the sum of $42,761.12 if said last mentioned sum had been allowed as a claim against the said bank and the dates when the same would have been payable are as follows: December 3, 1931, $10,690.28. March 16, 1932, $4,276.11. August 11, 1932, $4,703.72. April 11, 1934, $2,138.06."

It is true that this incidental question was not raised in the court below but this court can, and, we submit, should under the circumstances here presented, notice this error apparent on the face of the record. The reasons urged by the bank Receiver as warranting special consideration by this court to the depositors, the real parties in interest, are stated as follows by Mr. Justice Taft speaking for the Circuit Court of Appeals for the Sixth Circuit in Chemical National Bank v. Armstrong, 65 Fed. 573, 574:

"The fact that the point was not pressed by counsel for the receiver at the original hearing doubtless vested a discretion in this court to refuse to rehear the issue now urged. We would not by our action in this case wish to establish a precedent that this court will rehear any case upon a question lurking in the record, and not pressed at the first hearing, because, in a subsequent decision of the Supreme Court, a principle is established by which such question must be decided in a different way, and a different conclusion in the case reached. In this case, however, the moving party is a trustee appointed, not by the beneficiaries, but by the Comptroller of the Currency, and we feel disposed to exercise the discretion which we have in favor of a trust

fund thus administered, which we might not exercise in favor of parties representing their rights in person."

The illegal preference section declares payments made in violation thereof "utterly void" from which it follows that the Joint Company obtained no rights under the payment but only the duty to make restitution, plus interest. Section 193, Title 12, U. S. C. provides "The Comptroller shall, upon appointing a Receiver, cause notice to be given by advertising in such newspapers as he may direct for three consecutive months, calling on all persons who may have claims against such association to present the same, and make legal proof thereof." Section 194, Title 12, U. S. C. (App. p. 51) requires the Comptroller to make a ratable dividend "on all such claims as may be proved to his satisfaction or adjudicated in a court of competent jurisdiction."

Despite the publication of notice to file claims pursuant to the statute the Joint Company has never proved to the satisfaction of the Comptroller or had adjudicated by a court its general claim in the amount of $42,761.12, consequently it never became entitled to receive the dividends paid the bank's creditors as of December 3, 1931, December 16, 1932, August 11, 1932, and April 11, 1934, enumerated in the trial court's decree (R. 195). The Joint Company was not entitled to receive these dividends at the time of the trial court's decree and it is not entitled thereto today, not having proved its claim as required by law. The bank Receiver concedes that if and when restitution is made of the amount of the illegal payment, plus interest, the Joint Company has a valid general claim in the amount of $42,761.12 and *upon the filing thereof* the dividends heretofore paid other creditors should be paid immediately. However, the Joint Company would not be entitled to receive interest on these dividends because its failure to receive them when declared was due exclusively to its failure to file claim. Again quoting Mr. Justice Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit in Chemical National Bank v. Armstrong, 59 Fed. 372, 383:

"We are of the opinion that no interest can be allowed on any dividends due the Chemical National Bank for the period between the time when such dividends were declared payable and the presentation of the claim to the bank. The damage to the Chemical Bank from this delay was self imposed."

The depositors of the Manufacturers' Bank have been forced to assume the expense of litigating this case to the court of last resort and, we submit, if they prevail the decree should include all sums to which they are legally entitled, even though this incidental question was not raised in the court below by their trustee, the Receiver, who was not selected by them but by the Comptroller of the Currency under the law.

This interest question is of class importance in the disposition of the numerous cases of this character pending in the lower Federal Courts, referred to in the Joint Company's petition for certiorari, pages 14 and 15, and a decision by this court would be of substantial assistance to the lower Federal Courts and the Comptroller of the Currency in resolving such matters. Substantial amounts are frequently involved, as in the instant case, having in mind that this bank suspended on June 13, 1931.

E.

Additional comments on petitioner's brief.

Most of the points argued in the petitioner's brief have already been covered.

The Federal decisions primarily relied on by the petitioners are McDonald v. Chemical National Bank, 174 U. S. 610; Hayden v. Chemical National Bank, 84 Fed. 874; Rucker v. Kokrda, 68 Fed. (2nd) 73 and Lucas v. Federal Reserve Bank, 59 Fed. (2nd) 617, 619. We vigorously contend that none of these decisions give the petitioners any assistance.

In McDonald v. Chemical National Bank, supra, the insolvent National bank at Lincoln, Nebraska, suspended at the close of business January 21st, a Bank Examiner took possession January 22nd, and a Receiver was appointed February 6th, all in 1893. On January 21st the Lincoln Bank's account with its New York correspondent—The Chemical National Bank—was overdrawn in the sum of $25,515.32. Prior to the suspension of the Lincoln Bank a number of items had been placed in the mails for credit to its account with the correspondent bank. These items were received and credited by the correspondent after suspension *but before the correspondent had knowledge of the suspension.* This court held that "the mailing of these checks and remittances was a *delivery* to the Chemical National Bank whose property therein was not destroyed or impaired by a *subsequent act* of bankruptcy." (Italics ours.)

This case in the Appellate Court was styled Hayden v. Chemical National Bank of New York (C. C. A. 2) 84 Fed. 874. The petitioners at page 33 of their brief state "A case very similar on the facts to the case at bar is Hayden v. Chemical National Bank, 84 Fed. 861." We quote the statement of the case from the Appellate Court's opinion (p. 875):

> "This action was brought by the Receiver of the Capital Bank to recover of the Chemical Bank the remittances thus received by it on and after January 18th. The court below held that the title to the remittances passed to the defendant at the time they were severally mailed to it, and, as *they had been transmitted in the usual course of business, before the Capital Bank had committed or contemplated committing any act of insolvency, and were received innocently by the defendant,* the defendant was entitled to apply them upon the balance of account owing to it by the Capital Bank.
>
> There is no evidence in the record showing or tending to show that the condition of the Capital Bank had materially changed recently, or that it was in a situation of greater financial stress after January 18th than it

was January 1st, or had been previously. So far as appears its officers expected, down to the time when its doors were closed, that it would go on with its business in the usual way in the future, as it had for the last year. Whether the failure was precipitated by a discovery of the real state of affairs by the bank examiner, or by the directors, and, if so, when the discovery was made, does not appear. *There is not the slightest evidence that the defendant was aware of or suspected the real situation.* It had at times refused to permit the Capital Bank to increase its overdrafts, but, as late as January 19th and 20th, notwithstanding the state of the accounts, it paid drafts of the Capital Bank.

Treating the remittances as payments, made at the time they were mailed, *the case presents the question whether payments made in the ordinary course of business by a National banking association, which is doing business as usual, to a creditor who received them innocently,* is void if it turns out that the [illegible]tion at the time had become in such sense insolvent that its debts were greatly in excess of its assets, and its officers knew or should have known the fact, and knew or should have known that probably at no very distant day it would be obliged to suspend." (Italics ours).

It thus appears that in McDonald v. Chemical National Bank, supra, the recipient of the alleged illegal payment was in New York City and the insolvent bank in Nebraska; that the items were received innocently by the defendant; that the New York correspondent bank had no information not available to other creditors concerning the Nebraska bank's condition; that there was no evidence that the condition of the insolvent bank had materially changed from January 1st to the date of its suspension; that so far as it appears the officers expected it could continue in business; that "there is not the slightest evidence that the defendant was aware of or suspected the real situation" and that the items had been remitted prior to suspension to a creditor who received them innocently. In the McDonald case this court said "* * * The evidence fails to disclose any intention or ex-

pectation on the part of its officers to presently suspend. • • • There is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency or with a view to prefer the defendant bank." (Page 618).

How unlike the above facts are those presented in the instant case. In this case the payment was not received innocently by the Joint Company but came about through the "inside" information obtained by its agent, Ekstrom; *the Joint Company did have "inside" information* concerning the condition of the Manufacturers' Bank; there was evidence that the condition of the Manufacturers' Bank had changed, and the expectation that it could continue in business was materially changed on June 12, 1931, by the known inability of the Security National Bank to continue; the Joint Company through its agent was aware of the situation and the payment to it was not made or received innocently. In this case the evidence clearly discloses the intention or expectation on the part of its officers to presently suspend and there is ample evidence to justify the inference that the particular payment in question was made in contemplation of insolvency and with a view to prefer the defendant.

At page 30 of their brief appellants argue that the following excerpt from *Rucker* v. *Kokrda* (C. C. A. 10), 68 Fed. (2d) 73, 75, is applicable to this case:

> "When the payment was made, the decision to close the doors on the following morning had not been reached. That decision was not arrived at until late that night. True, the Officers knew that *unless new money was interested, or confidence restored,* the Bank could not indefinitely meet its customers' demands; but *when the payment was made, the Officers were hopeful the negotiations of the night would avert the necessity of an act of insolvency.* This payment was, therefore, not made in contemplation of the later act of insolvency." (Italics ours.)

We submit that the quoted language, when applied to the facts in the instant case, *establishes a violation of the section.* The Directors of the Manufacturers' Bank knew that unless new money was interested, or confidence restored, open insolvency was imminent. However, the only source of new money was the owners of their bank and their resources had already been exhausted. At the time of the payment here complained of the Directors had no hope that the negotiations of the night would avert open insolvency because they knew there was no prospect that the Third National Bank would take over their bank without a large additional payment in cash, which they knew could not be raised from any source prior to the opening of the next business day. In Rucker v. Kokrda as in McDonald v. Chemical National Bank the important fact was that the creditor had no "inside" information concerning the bank's condition. If the creditor had such information the payment would not be in the ordinary course of business and would violate the section. We emphasize that in the Rucker opinion the Appellate Court said at page 74, "There is no proof and no finding that he had any inside information as to the bank's condition * * * the day he closed his account."

We accept the following excerpt from Lucas v. Federal Reserve Bank, 59 Fed. (2nd) 617, 621, quoted in the petitioners' brief at page 36 as applicable but contend that the language we have emphasized rather than that italicized by the petitioners controls the facts in the instant case:

> "The purpose of the Statute was to guard against the wrongful or preferential disposition of the assets of a Bank by its officers, in contemplation of insolvency; and the knowledge and intent which it requires for avoiding a transfer, relate to the knowledge and intent on the part of the Officers of the Bank, who alone have the power to make the transfer. (Citing cases.)
>
> "As said by Judge Wallace in the case of Armstrong v. Chemical National Bank, supra, '*a Bank is not in contemplation of insolvency until the fact becomes rea-*

sonably apparent to its officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations. On the other hand, if the Officers of the Bank make the transfer in contemplation of insolvency with a view of granting a preference, the transferee's knowledge, or want of knowledge, is immaterial.' (Citing cases). If the officers have no such knowledge or intent, it manifestly cannot be condemned as preferential, whatever may be the knowledge or intent of the transferee." (Italics ours.)

A long time of decisions, many of them recent, applying the illegal preference section, are annotated following Section 91, Title 12, U. S. C. A. We find no decisions reported, or unreported, that support the contention of the petitioners that Section 5242 U. S. R. S. was not violated by the payment complained of in this case.

The petitioners' brief at page 44 states, "We must know if Ekstrom directed the issuance of the check * * * admittedly it was not directed by him to be prepared." The record contains considerable testimony introduced in an effort to establish that the responsibility for the drawing of the check was that of a $225 a month bookkeeper or some minor employee or official other than Ekstrom. But Ekstrom admitted in his answer (R. 20), " * * * this defendant admits that he left said meeting at about 12:00 o'clock on said June 12, 1931, and * * * caused said check of $42,716.12 to be drawn," and (R. 21) "that this defendant caused said money to be drawn out."

The petitioners persist in stating to this court at page 8 of their brief that the Manufacturers' Bank had approximately one-half a million dollars in cash or its equivalent when it suspended, despite the correction at page 15 in the brief of the respondent in opposition to the granting of a writ of certiorari. We again insist that the available cash on deposit in the Federal Reserve Bank, according to the defendant's exhibit No. 5 (R. 171), referred to by the petitioners as authority for their statement, was $120,126.89 and

not $220,181.20 as stated by the petitioners. The uniform practice of Federal Reserve Banks to deduct a member bank's rediscounts in computing its available cash balance was testified to by Achor (R. 48-53-70), who had been a Federal Reserve Bank Examiner, and by Examiner Baty (R. 44) and page 2 of defendant's exhibit 5 (R. 172) lists the rediscounts in the amount of $100,054.92 which had been made with the Federal Reserve Bank and which sum the appellants again fail to deduct from the cash available at the Federal Reserve Bank. There is evidence (R. 44, 48) that the rediscounts totaled $156,000. The rediscounted items represented a liability of the Manufacturers' Bank to the Federal Reserve Bank and clearly the Manufacturers' Bank had a right to receive only such cash as remained after a reconcilement of the mutual accounts. Scott v. Armstrong, 146 U. S. 499, 508; Dakin v. Bayly, 290 U. S. 143, 148.

The Manufacturers' Bank did not have approximately half a million dollars in cash when it suspended, but had exactly $253,240.06 in cash on hand, total available deposits in all other banks $132,562.83, total $385,802.89. Some of the Directors of the Manufacturers' Bank testified that they thought this sum sufficient to face the run at the commencement of the next business day with a deposit liability of approximately $4,200,000. However, the Third National Bank, a sound bank operating today, was unwilling to face the deposit liability of the Manufacturers' Bank unless $750,000.00 additional in cash was raised prior to Monday's opening. That the position of the Third National Bank was absolutely sound and the Directors of the Manufacturers' Bank had no real hope that its open insolvency could be postponed for more than a few hours is clearly demonstrated by what occurred on Monday in Rockford when three banks suspended and the largest bank in the city suffered a loss of more than $700,000.00 in deposits (R. 64, 65, 45).

At page 19 of their brief the petitioners state:

> "If there was a bank in this great country during 1931 which did not have assets in its portfolio which

were criticized by the Comptroller it was the exception. If there was a bank at that period whose Officers were sure it was solvent in the sense that its assets at their then value were in excess of its liabilities, such a Bank was a rarity."

This statement is not supported by the facts, record or otherwise. But it was exceptional in 1931 for the Comptroller to write the Board of Directors of a National Bank a severely critical letter based upon a report of the bank's condition recently received advising them of the bank's "present dangerous situation," that "the bank is faced with potential losses that threaten its solvency" and requesting the Directors to "please also note the heavy borrowings of certain of the Directors and their concerns, approximately 31 per cent of the total loans and discounts, and the Examiner's statement that some of their lines are the weakest in the bank and heavy losses appear inevitable." Such a letter, accompanied by a copy of the report upon which it was based, was sent the Board of Directors of the Manufacturers' Bank (R. 248-254) and was received and examined by them, including Director Ekstrom (R. 30), a few days prior to June 12, 1931, the date on which the crisis at Rockford was precipitated by the inability of the Security National Bank to continue, and the day before the payment complained of.

Petitioners suggest at a number of places in their brief that the resolution to close the Manufacturers' Bank was passed under threat by the District Chief National Bank Examiner of criminal prosecution of the Directors by the Comptroller if the bank was kept open and further deposits received. The contention is not material to the issues of this case, and is not substantiated by the record. It is a fact that Ekstrom so testified, but he is not corroborated by the others present at the meeting. Achor testified (R. 62), "I did not hear him say that they would be prosecuted for receiving deposits if they kept the bank open." We submit that no such threat was made. The District Chief National

Bank Examiner knew the law and the Directors are charged with its knowledge. It is well settled by the decision of this court in Easton v. Iowa, supra, that no criminal statute is violated when the Directors or officers of a National Bank receive deposits under conditions of known insolvency.

The petitioners argue at page 52 of their brief that Ekstrom did not use the knowledge he obtained to prefer himself, pointing out that he did not withdraw his personal deposit. Of course Ekstrom knew that he would receive credit for this deposit 100 cents on the dollar through offset against his indebtedness to which he was entitled under the law, *Scott* v. *Armstrong, supra; Dakin* v. *Bayly, supra.* The situation was different as to the Joint Company in that it did not owe the bank; consequently the affirmative action taken was designed to save it from loss.

The petitioners, at page 78 of their brief, point to and discuss the use by the court below of the term "act of bankruptcy" instead of "act of insolvency." These terms are frequently used interchangeably and were so used by this court in *Chemical National Bank* v. *Armstrong, supra* (p. 40 this brief). This court treated the Bankruptcy law and the National Banking law as of practically the same import. *Rector* v. *City Deposit Banking Co.*, 200 U. S. 405-418.

ALLEGED ERROR OF TRIAL COURT IN ADMITTING IN EVIDENCE RESPONDENT'S EXHIBITS 22, 24 AND 25.

Pages 99-106 of petitioners' brief relate to the contention that certain bank examiners' reports and certain letters from the Comptroller to the bank (Respondents' Exhibits 22, 24 and 25; R. 242-254) were improperly admitted in evidence.

The testimony of Ekstrom (R. 28, 30) establishes that he read and/or was cognizant of the contents of these documents; and findings Nos. 13 and 15 of the trial court (R. 189, 190) likewise so indicate.

Consequently these documents were admissible for the purpose, inter alia, of establishing that Ekstrom, as a director of the bank, had knowledge of the condition of the bank as found by the Comptroller through the national bank examiners, and other officers of the Comptroller's office who were required by law to examine the bank and report to the Comptroller for such action or criticism as the Comptroller might consider proper under the circumstances. Guthrie v. Harkness, 199 U. S. 148, 156.

Such knowledge on the part of Ekstrom was, of course, a material and relevant fact on the issues of preferential withdrawal of funds of the Joint Company and Ekstrom's personal liability in connection therewith.

The knowledge of Ekstrom, as to the condition of the bank, both as derived from the aforesaid documents and from other sources and transactions, such as directors' meetings and conferences, were necessarily imputed to the Joint Company when he acted for the Joint Company in its transactions affecting the affairs and condition and assets of the bank. As stated by the Court below (R. 236, 237):

> "It is contended, however, by appellants that the evidence conclusively shows that the check was drawn and signed before the bank directors' meeting on June 12; that Ekstrom did not order the check drawn nor divulge to the Mechanics Company or its agents any information received by him at the directors' meeting; and that neither the drawing of the check nor the money was caused by any information received from Ekstrom. Without conceding it, we shall treat the language of these contentions as tantamount to saying there was no substantial evidence to support the court's findings in these respects. It would serve no good purpose to set forth the evidence in detail. A perusal of the entire record convinces us that with respect to both appellants, the court's findings are supported by direct material evidence as well as by logical and legitimate inferences. It is further contended, however, that the court will not indulge in the presumption that Ekstrom divulged to others any information received from the bank direc-

tors' meeting. That may be conceded, but the court's findings and conclusions are not based on that presumption. That Ekstrom signed the check as president of the company after he left the bank directors' meeting is supported by material evidence, and he neither affirmed nor denied it. He was an officer of the Mechanics Company, as well as a director of the bank, hence it was not necessary for him to divulge any information to accomplish the withdrawal of the funds. He, whose signature gave vitality to the check, already had the information when he signed it. That act was his company's act, and his information at that time was his company's information. These circumstances, we think, constitute a sufficient basis for the court's conclusions Nos. 4, 5, 6, and 7, 8, 9."

On the general proposition that notice to the agent is imputed to his principal, see:

St. Louis Ry. Co. v. *Johnston*, 133 U. S. 566, 576.
Curtis, Collins & Holbrook Co. v. *United States*, 262 U. S. 215, 222, 223.
Mutual Life Ins. Co. of New York v. *Hilton-Green, Executors*, 241 U. S. 613, 622.

The hopelessly insolvent condition of the Manufacturers' Bank at the time of the payment is established by the bank's books and records plus the other facts known to the directors. Ekstrom and the other directors had undertaken to take part in the management of the bank and had sworn to be diligent in the performance of their duties. They knew the contents of the Examiner's reports of the condition of the bank and the Comptroller's severely critical letters. The directors were bound to take cognizance of the facts concerning the bank's condition pointed to and commented on by the Comptroller and the Examiner. Achor who was the bank's vice-president testified at length as to the bank's condition about the time of the payment and to the fact that the Examiner's report correctly reflected the bank's condition (R. 54). Examiner Baty's comment concerning the bank's condition at the directors' meeting on

June 12, 1931, was based on the bank's books and records, available to the directors. The directors could verify if they saw fit, Examiner Baty's statements concerning the bank's low cash position; its inability to raise further funds; and being present in Rockford the directors certainly knew that the crisis that did occur would occur at the opening of business on Monday. Neither Ekstrom nor his associates can be heard to say that they did not know what they should have known, as a matter of law, had they diligently performed their duties as directors.

CONCLUSION.

The Bank Receiver respectfully submits that under this record and the authorities discussed this court should affirm the decision of both courts below that the payment complained of violated Section 5242 U. S. R. S. and affirm the judgment given against both appellants except that the decree of the trial court should be modified to give the Receiver judgment for the amount of the payment plus interest thereon at the legal rate from June 13, 1931, to the date of restitution, without crediting thereon dividends paid to the bank's creditors as of the dates paid, permitting the Joint Company to receive the dividends that will be due on its general claim, without interest thereon, when its claim is filed with the Receiver.

Respectfully submitted,

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APPENDIX.

Section 192, Title 12, U. S. C. A.

DEFAULT IN PAYMENT OF CIRCULATING NOTES. On becoming satisfied as specified in sections 131 and 132, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

Provided, That the Comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or National bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited. Such depositary shall pay upon such money interest at such rate as the Comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. (R. S. 5234; May 15, 1916, c. 121, 39 Stat. 121.)

Section 194, Title 12, U. S. C. A.

DIVIDENDS ON ADJUSTED CLAIMS; DISTRIBUTION OF ASSETS. From time to time, after full provision has been

first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)

Section 73, Title 12, U. S. C. A.

OATH. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. The oath shall be taken before a notary public, properly authorized and commissioned by the State in which he resides, or before any other officer having an official seal and authorized by the State to administer oaths, except that the oath shall not be taken before any such notary public or other officer who is an officer of the director's bank. The oath subscribed by the director making it, and certified by the notary public or other officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency and shall be filed and preserved in his office for a period of ten years. (R. S. 5147; Feb. 20, 1925, c. 274, 43 Stat. 955.)

Memorandum of conclusions and order for judgment

No. 5063-J.

United States District Court, Southern District of California—Central Division.

N. F. Schilling, as Receiver of The United States National Bank of Los Angeles, a national banking association, Plaintiff, vs. A. Sieroty, also called Adolph Sieroty, and Bertha Sieroty, husband and wife, Defendants.

The United States National Bank of Los Angeles suspended on August 18th, 1931, and has since been in charge of the plaintiff receiver, appointed by the Comptroller of the Currency. For several years prior to August 8, 1931, defendant Bertha Sieroty maintained a term account (apparently her separate funds) with the bank. No withdrawals had been made since August, 1929, until a check closing the account was debited on August 8, 1931. This check was for the amount of $5,902.78 and was made payable to Adolph Sieroty, the depositor's husband, who was at the time a director of the bank and had been such throughout the year 1931 and up to the closing date of the bank. The check was dated July 31, 1931.

The receiver has sued to recover this deposit under the provisions of Title 12, U. S. C. A., Section 91, which, in parts material here, provides that payments of money by a national bank "made after the commission of an act of insolvency, or in contemplation thereof, . . . with a view to the preference of one creditor to another . . . shall be utterly null and void."

Defendant A. Sieroty disclaimed that he knew of any condition of threatened insolvency of the bank. It appears that not only did he withdraw his wife's deposit at the date mentioned, but also that three large business concerns in which he was, with his family, largely interested, and which had carried very large term accounts with the bank, closed their accounts on August 3rd, 6th and 8th, 1931. These accounts had been on the books since the year 1929. The account of Minna Falk, wife of a nephew of A. Sieroty, was also closed by check dated August 12, 1931, the check being payable to A. Sieroty.

The explanation given by the defendants' witnesses as to why the accounts were closed at dates so close to the suspension of business by the bank, which explanations sought to attribute to the acts anything but the important reason of anticipated insolvency of the institution, are not convincing. In the light of facts which will be later stated, the real reasons and purposes are made plain enough.

The decisions cited by the several counsel have been given careful study and need not here be reviewed, as it is my intention to state the conclusions that I have arrived at only, with such a review of the evidence as is necessary to illustrate them.

Under the terms of the statute it is of course necessary that it be shown that at the time the money was paid out closing Bertha Sieroty's account, insolvency of the bank was anticipated by the directors. Not insolvency in the sense of the Bankruptcy Act, but a situation reached where in the ordinary course of its business the bank could not meet its obligations as they fell due; the intent and purpose of the depositor being an immaterial factor. Here the intent of the depositor was bound up with that of the husband, who was a director of the bank. That the depositor's decision to withdraw her account was made in fact by the husband there can be little doubt, notwithstanding that Mrs. Sieroty said that she, herself, had decided to withdraw because she entertained some dislike for a Mr. Cohen, who had been executive vice president of the bank. The fact was that Cohen had resigned his office more than a month and a half prior to the date when Mrs. Sieroty's account was closed.

Coincident happenings may be often-times remarkable through the result of mere chance, but the occurences respecting the sudden closing of all accounts in which Director Sieroty had an interest, are consistent only with one purpose and design. A summary of facts shown by the evidence is convincing of the correctness of this statement:

The bank, by voluntary act of the directors, closed its doors on August 18, 1931. From an early date in the year 1931, its condition had not been such as to satisfy the Examiners of the Comptroller's department. The most material source of a bank's revenue is ordinarily its interest earnings on loans. The examiners were critical of the loans, estimating many of them as doubtful or wholly

valueless. Loans to directors, and notes upon which directors' names appeared as indorsers, were also made question of. The report of the examiners under date of April 16, 1931, contained the following statements:

"Laden with slow and doubtful assets, this bank presents a serious problem. The committee of the board of directors has said that $100,000.00 is all that can be raised at this time; hence the problem at this time resolves itself into a workout, with the hopes that a portion of the assets can be rehabilitated into collectible loans, and that the bank's earnings will protect the remainder thereof, . . . Under proper management and the accumulation of profits faster than the accrual of losses, if the bank can show a continued improvement, *there is a possibility*, over a long period of time, of the bank working from under its asset position. If, however, losses accrue faster than accumulated profits, and the general asset condition becomes worse, additional funds will have to flow to the profit account through statutory means, or otherwise." (Italic face type added in emphasis of view of examiners that at best there was a *possibility* of improvement, rather than a probability.)

On July 2, 1931, the Comptroller wrote to the bank's directors: "Bank's condition from the standpoint of undesirable assets is decidedly unsatisfactory. As the examiner states it presents a serious problem . . . It is hoped that you will be able to prove the worth of all the listed loans and at least keep losses within a figure that can be taken care of through the bank's earnings."

Efforts had been made from early in 1931 by the directors to improve the cash position of the bank without success. At a meeting of the board held in June, 1931, it was decided to omit dividend to stockholders. Such was the precarious state of the bank's business when, as a climax to its misfortunes, the claim was made by the receivers of the Ferguson trusts, on July 6, 1931, for an amount in excess of $2,000,000, allegedly due because of the negligence of the trust department of the bank, in the handling of those trusts. Aside from the difficulty which the bank faced in the matter of producing cash enough to meet any considerable part of this demand, the fact that it was asserted that its officers had been so careless as to cause a liability against

the bank, was bound to react against the institution's credit and reputation. It did so react. While at no time during 1931 had the bank been able to increase greatly its deposits, from the last of July, 1931, up to the time when the bank closed its doors on August 18, 1931, deposit balances fell off daily. On August 18, 1931, deposits were more than $3,000,000 less than they were on July 31st preceding.

When the bank closed its doors, national bank examiners immediately checked up its books. Of a total "loan and discount" schedule of $5,234,732.56, the appraisement of the examiners was that there was a total loss of $1,031,-233.30, as for bad loans, with $202,953.63 of doubtful value. The estimated loss over capital structure (capital plus surplus and undivided profits) was $201,846.76. On the loan list was found a total of loans to directors of $551,675 with $188,300 unsecured. In addition to this, directors had indorsed notes of others to the amount of $171,950.

While the directors of the bank who testified in the case affirmed the belief that they had considered that the bank could pay its liabilities prior to closing, it appeared that they had appealed to the Los Angeles Clearing House for assistance in settling the Ferguson trusts claims at a compromise figure of $400,000. They had been unable to get the needed assistance. One director said: "The bank had no funds to carry out the deal—The bank didn't have cash to meet the demands." Mr. W. B. Heim, secretary and director of the bank, testified that rumors concerning the Ferguson trusts claims were current sixty days before the bank closed, and that the bank officers attributed the withdrawals of deposits almost entirely to those rumors.

The receiver who was appointed to liquidate the bank's business estimated a deficit between resources and liabilities of over $1,000,000, not including the Ferguson trusts claims. By assessment against stockholders he estimated that the deficit might be reduced one-half.

And now, what was the knowledge of defendant A. Sieroty of the bank's condition at the time he caused the deposit of his wife to be withdrawn on August 8, 1931? He had been a director of the bank at all times material here and until the closing date. He attended the meeting in June of the directors when the dividend was ordered to be omitted. He was present at the directors' meeting of July 29th when the letter dated July 2, 1931, from the Comptroller, was read (as hereinbefore referred to). At the

same meeting a firm of attorneys was employed to advise the board regarding the Ferguson trusts claims. Aside from any presumptive knowledge that may be properly charged to the mind of directors, (the managing agents of the stockholders), the record in this case is complete in its showing of facts and circumstances showing that defendant A. Sieroty was well aware of the hazardous condition attending the future of the bank, even before the Ferguson claims were put forward. Income had fallen off; the bank examiners and the Comptroller's office had indicated that new resources must be acquired. Deposits diminished from the end of July. Whatever a director may say by word as to his lack of belief in the bank's stability, he will be held to have knowledge of those things which his duty required him to be informed of. In this case the express showing of the evidence makes it unnecessary to rely alone upon the presumption.

And a director of a bank, having knowledge of the probability that his bank will close its doors, who influences the withdrawal of deposits made by persons connected with him in the family relation, all with the purpose of seeing that such depositors secure one hundred per cent of their deposits, where if such deposits remained until the bank closed returns would be delayed and fractional amounts only returned, fails in his duty to the creditors of the bank. The case is to be considered in a different light from a case where a depositor continues his regular business of depositing and withdrawing money up to the date when the bank closes its doors. It does not follow that such last withdrawals may be recovered. Such payments by the bank do not come within the qualification of the statute as being made "with a view to the preference of one creditor to another." Every bank up to the moment of its actual closing, ordinarily proceeds to do banking business. Here we know that the bank was in such a condition as that when the trusts demands were made, it was powerless to escape closing unless outside money could be obtained; there was the *hope* on the part of the directors that money might be procured, and it was with this hope in mind that the doors were kept open. Efforts to raise money failed. To permit Mr. Sieroty, as agent for his wife, to exercise his discretion as to the proper time to save his wife's deposit intact, at the expense of other creditors, would contravene the plain purpose of the statute.

The bank allowed the deposit to be withdrawn with full knowledge of the conditions stated. The closing of the bank was apprehended as a probability—such closing establishes insolvency. It matters not that the bank in liquidation might be able to pay a large percentage of its liabilities. If it does, then depositing creditor here will receive proportionate dividends.

Findings and judgment will be in favor of the plaintiff against Bertha Sieroty, to which an exception will be noted.

Dated August 21, 1934.

WM. P. JAMES
U. S. District Judge.

THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 3656

DAVID E. UHL, Receiver of the Grand Rapids National Bank, *Plaintiff*,

vs.

THE FIRST NATIONAL BANK & TRUST COMPANY, of Kalamazoo, Michigan, a national banking corporation, *Defendant*.

This suit is brought under section 91, Title 12 U. S. C. A. (R. S. sec. 5242), which in effect declares null and void all payments of money by a national bank to creditors after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by the National Bank Act, or with a view to the preference of one creditor to another. The obvious purpose of this section and of section 194 of the same title is to secure equality of distribution of the assets of an insolvent bank among its creditors. (See Smith v. Baldwin, 69 F. (2d) 390, and Jennings, Receiver, v. United States Fidelity & Guaranty Company, U. S. Sup. Ct., February 4, 1935.) Plaintiff seeks recovery of the sum of $115,107.58 alleged to have been withdrawn in circumstances which resulted in an unlawful preference.

Waiver of jury trial was duly filed.

The parties are in accord upon many of the important facts, and recognize the fundamental principles of law applicable thereto, as stated in Nelson *v.* Lewis 73 F. (2d) 521, 523—

> "If the financial condition of a bank is such that an actual act of insolvency is imminent, and the officers of the bank know or ought to know this condition, a payment to a creditor or depositor is void if not made in the ordinary course of business; an intent to prefer is presumed under such conditions, and as a rule the creditor and depositor need not know of the imminency of the act of insolvency. National Security Bank v. Butler, 129 U. S. 223, 9 S. Ct. 281, 32 L. Ed. 682; Federal Reserve Bank of Kansas City v. Omaha Nat. Bank

(C. C. A.) 45 F. (2d) 511; Parks v. Knapp, 29 F. (2d) 547 (C. C. A. 8); American Surety Co. of N. Y. v. Jackson, 24 F. (2d) 768 (C. C. A. 9); Brill v. McInnes, 14 F. (2d) 306 (C. C. A. 8)."

The controversy arises from the fact that at the time of the alleged preferential payments, a banking moratorium pursuant to proclamations of the Governor was in effect in the State of Michigan. Defendant takes the position that the withdrawals complained of were made in the ordinary and usual course of business transacted between defendant and the Grand Rapids National Bank, and were not actuated by knowledge of insolvency.

The situation so far as material to the issues is as follows,—On February 11, 1933, defendant had on deposit in the Grand Rapids National Bank $121,099.46. The Bank was closed on both February 12th and February 13th, the 12th falling on Sunday and the 13th being observed as Lincoln's Birthday, a legal banking holiday by statute. In the early morning of February 14th, a proclamation was issued by the Governor which proclaimed the days from Tuesday, February 14, 1933, to Tuesday, February 21, 1933, both inclusive, to be public holidays, "during which time all banks, trust companies and other financial institutions conducting a banking or trust business within the State of Michigan shall not be opened for the transaction of banking or trust business, the same to be recognized, classed and treated and have the same effect in respect to such banks, trust companies and other financial institutions as other legal holidays under the laws of this state, provided that it shall not affect the making or execution of agreements or instruments in writing or interfere with judicial proceedings". The bases for the proclamation were recited to be an acute financial emergency existing in the City of Detroit and throughout the State of Michigan, and requests by the Michigan Bankers Association and the Detroit Clearing House. The Grand Rapids National Bank was closed, pursuant to this proclamation, from February 14th to February 21st, inclusive, and also on February 22nd, a legal holiday. On February 21, 1933, the Governor issued a second proclamation which announced "that all banks, trust companies and other financial institutions conducting a banking or trust business within the State of Michigan prior to said holiday, shall be opened for the transaction of

business at the regular opening hour on the morning of Thursday, February 23rd, 1933, provided, however, that such business shall be limited to the following functions:

"1. Reserve deposits shall be available to depositing banks and may be drawn without creating a preference.

2. Payments to depositors in either commercial or savings departments shall be limited in amount to the proportion the total individual deposit bears to the cash on hand, available reserves in banks and United States Government bonds in each such department. Such payments shall only be allowed for necessary purposes, such as payrolls, bank transit items created on and after February 23, 1933, necessary living expenses, tax payments, or other obligations to the State of Michigan and subdivisions thereof, or to the Federal Government, drafts with bill of lading attached, Reconstruction Finance Corporation monies on deposit for welfare purposes, and such other purposes necessary for the ordinary conduct of business, providing always that no depositor shall be preferred as against any other depositor.

3. Banking institutions may take new deposits, but such deposits shall be treated as trust deposits, and there shall be opened in each such institution a trust deposit department. Such deposits shall be payable on demand without interest and held solely for the repayment of such depositors.

4. Banks and trust companies acting in a fiduciary capacity may perform their duties and discharge their obligations in such capacity, provided that in the exercise of such fiduciary functions debtor and creditor relationship shall not be involved.

5. Such modifications in the foregoing limitations as may be necessary in extraordinary cases may be allowed with the consent of the State Banking Commissioner, provided, however, that no depositor shall be preferred as against any other depositor."

"The bank holiday heretofore proclaimed by me shall continue in effect subject to the foregoing limitations until otherwise ordered by me."

It will be observed that by the terms of this second proclamation, reserve deposits were permitted to be withdrawn without limitation.

On February 22, 1933, the board of directors of the Grand Rapids National Bank, in common with the other banks of Grand Rapids, decided to pay 5% to all commercial, savings, and certificate of deposit depositors; to accept so-called trust or demand deposits which would be held separate and not subject to restrictions; and to return all outstanding checks dated prior to February 23, 1933. This decision was carried into effect and on the morning of February 23, 1933, the bank reopened on the limited basis indicated as to general depositors but released the deposits of other banks without limitation. The bank never reopened for regular business, but continued for about four months to accept deposits having the status of trust funds.

On or about March 20, 1933, efforts were made to bring about a reorganization of the bank by obtaining subscriptions to capital stock by depositors to the extent of 25% of their deposits under a plan whereby the entire pre-existing capital stock and surplus were to be cancelled. These efforts were continued until about June 29th. The federal authorities refused to sanction the plan, and a Conservator was appointed on that date. The affairs of the bank were conducted by the conservator until September 25, 1933, when David E. Uhl was appointed receiver.

Later, certain of the assets were sold to a new bank known as the National Bank of Grand Rapids and the remaining assets were left in the hands of the receiver for liquidation. Dividends of 50% and 10% have thus far been paid to creditors largely from the proceeds of government loans obtained by pledging assets.

On April 7, 1933, an act of the Michigan legislature became effective which declared an emergency in respect to the banking and credit structure of the state, authorized the Governor to declare public holidays to be observed by banks, trust companies and other financial institutions, and ratified and confirmed any proclamations previously issued in respect of the emergency, and the acts of banks performed pursuant to such proclamations. (See Act 47 of Public Acts of Michigan of 1933.)

There is no dispute that on February 11, 1933, defendant's net balance in the Grand Rapids National Bank (after deducting certain items returned dishonored) was the sum of $121,046.65. This entire amount was withdrawn by defendant during the period between February 23, 1933,

and March 10, 1933, on which date there was an overdraft. Plaintiff concedes that defendant, in common with other depositors, was entitled during that period to withdraw 5% of its balance and that defendant was entitled to be credited with a small item of interest, leaving the balance of $115,107.58 for which plaintiff asks judgment in this action.

The problem presented is whether or not the payments made to defendant between February 23rd and March 10th were made after the commission of an act of insolvency or in contemplation thereof, and were made with a view to prevent the application of the assets of the bank in the manner prescribed by the National Bank Act. Material aid in the solution of this question is afforded by the report of examination of the bank made between February 3rd and February 10, 1933. A summary of this report of the national bank examiners is attached as Note I. The report discloses that the control of the bank was owned by the Guardian Detroit Union Group of Detroit; that the entire capital and surplus of the bank was $1,300,000; that loans had been made to directors, officers and employees in the aggregate of $754,215.60; that of this amount over $300,000 was without collateral, and that large amounts of the deposited collateral to secure loans had become practically worthless; that the directors, officers and employees had assumed further liabilities as endorsers or guarantors to the amount of $194,056.49; and that loans had been made to corporations or enterprises in which the directors or officers were largely interested to the amount of approximately $288,000. It is clear that the margin of safety commonly afforded by capital and surplus had been largely absorbed by those charged with responsibility for the solvency of the bank.

Of the total loans and discounts of $8,473,470.59, the examiners listed $3,790,694.08 as slow, $1,227,050.37 as doubtful, and estimated losses thereof at $84,468.03.

They also reported that the bonds and securities held by the bank had depreciated to the extent of $437,881.24. The report also disclosed an indebtedness upon a portion of the bank site to the extent of $200,000. The examiners' report concluded as follows:

> "With the heavy concentration of criticised assets, the bank has a major problem confronting it, and the

directors were advised of their responsibility in connection with the large amount of doubtful items now being carried. * * * With the large amount of money invested in banking house, the inadequacy of the bank's capital structure is readily apparent."

When it is considered that the demand deposits at the time of the report amounted to $6,776,990.26; that the time deposits amounted to $5,447,164.74; that in addition thereto the amount due banks and trust companies was $1,420,925.03; and that government deposits amounted to $67,476.56; it is obvious that the condition of the bank was precarious prior to the proclamation of the bank moratorium.

The record discloses contradictory opinion testimony as to whether on February 11, 1933, the bank was solvent or insolvent, based upon comparative values of resources and liabilities. There can be no doubt that, if solvent at that time, it was by a narrow margin.

When there was projected into the situation following the proclamation of February 14th the hysteria and panic resulting from the fear engendered in the mind of the public for the safety of its funds, it became apparent that the bank could not reopen in the ordinary course of business. The careful examination of the assets of the bank made by and on behalf of the officers and directors during the eight days following must have forced the conclusion not only that the bank could not presently open in the usual course but that there then existed no reasonable prospect that it would be able so to do at any future time. The most optimistic plan for reopening which was evolved was the one of about March 20th, predicated upon the complete surrender of all capital stock and surplus, and surrender by depositors of their rights as creditors to the extent of 25 per cent of their deposits, a total elimination of liabilities of an amount considerably in excess of $4,300,000. After several months of determined effort, this plan was rejected not only by depositors but by federal authorities. The promulgation of such plan was in itself convincing evidence of recognition of a then existing state of hopeless insolvency.

No proof appears of any unusual event or circumstance which substantially affected the value of the assets of the Grand Rapids National Bank between February 22nd and March 20th. If conditions such as those suggested on that later date were necessarily to permit reopening the bank, it

must be assumed that substantially the same situation existed at the dates of the alleged preferences.

The case of *Hirning* v. *Federal Reserve Bank of Minneapolis*, 52 F. (2d) 382, held that a resolution of the board of directors of a bank suspending the bank's operations was an "act of insolvency." The authorities agree that a national bank is "in contemplation of insolvency" when the fact becomes reasonably apparent to its officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations. (See *First National Bank of Ortonville, Minn.* v. *Andresen*, 57 F. (2d) 17; *Browne* v. *Stronach*, 7 F. (2d) 685.)

The judgment of the court is that, at least at the time of the determination by the directors of the Grand Rapids National Bank on February 22nd, that the bank would reopen only on a basis which amounted to the impounding of 95 per cent of the deposits, and which involved the dishonoring of all checks dated prior thereto, it was clear that the bank could not meet its obligations and that it could never resume its usual course of business. Judicial notice may be taken of the fact that some banks refused to close under the proclamations of the Governor and that many others soon after the period of closing resumed business. Many entirely solvent banks closed and others of doubtful solvency were probably rendered insolvent as the result of the proclamations.

Defendant urges that the transactions here complained of were justified because the defendant and the Grand Rapids National Bank after February 22nd carried on the same business relations and transacted the same sort of business between themselves as they had engaged in prior to February 11, 1933, and that therefore the transactions were in the ordinary course of business as between them. It also urges that there was no thought of insolvency of the Grand Rapids National Bank at the time the withdrawals complained of were made, and that there was no reason then to believe that the bank would not open on an unrestricted basis at an early date. It is stated that the transactions between the two banks may properly be said to have been "in the ordinary course of business" within the meaning of the rule. As indicated, the court does not concur in these views.

Payment of funds by an insolvent bank to a reserve bank was held void as a preference in the case of *Vann* v. *Fed-*

eral Reserve Bank of Richmond, 47 F. (2d) 786. In the case of *National Security Bank* v. *Price,* 22 F. 697, it was held that after a vote of directors to close the bank and go into liquidation, any transfer of assets to a creditor whereby that creditor secures a preference will be presumed to have been made with a fraudulent intent. This case was affirmed in *National Security Bank* v. *Butler,* 129 U. S. 228.

The case of *Varden* v. *City of Corbin, Ky., et al.,* 2 F. Supp. 840,841, holds that where the nature and probable consequence of a transfer of notes to depositors was to prefer such depositors, the officers cannot claim that a preference was not intended. The court said:

> "Whether the officers of the bank realized to the full extent that such was its condition at this time, it was 'reasonably apparent' that such was the case. They should have realized it and closed its doors. * * *
>
> "Here the natural and probable consequences of these transfers was to prefer, and the officers cannot be heard to say that they did not intend to prefer."

It is true that the banking moratorium created a novel situation and one which necessitates careful scrutiny of the facts in suits arising therefrom. Wherein recovery is sought of alleged preferences under section 91. No rule of general application can be stated. Decisions on issues arising in this field must be narrowly confined within the bounds of the facts of each case, because differentiating circumstances may lead to different results.

Emergencies, when met not with caution and wisdom but by hasty action frequently become catastrophes. Confused and contradictory explanations immediately following the first proclamation by the Governor induced general belief that financial or industrial powers were struggling for control, with the result that what had been at most a local emergency became nationwide chaos. Prior to the proclamation, the Grand Rapids National Bank, with practically its entire capital and surplus loaned to directors or their enterprises, had possessed a species of doubtful solvency, depending on uninterrupted activity for such stability as it possessed. Following the proclamation, this stability came to an end and, had the officers stopped to consider the situation, they must have seen that ultimate failure was inevitable.

It is impossible to conceive any basis for a claim that the Governor's proclamation of February 21st afforded justification for preference of deposits made by banks, or that the Michigan legislature could give validity to such preferences by the act of April 7, 1933. Both the Governor's proclamation and the act of the legislature attempting to ratify the same were entirely nugatory so far as applied to the distribution of assets of national banks. The proclamation resulted in withdrawals from the Grand Rapids National Bank within ten days after February 22nd of in excess of $560,000 by banks, while public moneys and private deposits were impounded to the extent of 95 per cent. This followed naturally from the clear usurpation of the powers of Congress by the state executive. The ultimate result was a 5 per cent distribution to those whose rights were invaded and 100 per cent distribution to many of those whose sanction and advice induced the action.

In the case of *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283, it is said:

> "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created. These principles are axiomatic, and are sanctioned by the repeated adjudications of this court."

A similar holding by Justice Day is found in the case of *Van Reed* v. *People's National Bank*, 198 U. S. 554, 557,—

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit."

Also, in the case of *Gilbertson* v. *Northern Trust Co.*, 207 N.W. 42, it was held that no state statute can override the prohibition of the National Bank Act relating to preferences. (Se also, 7 C.J. 760.)

Application of these principles to the facts established by the record brings the conclusion that plaintiff is entitled to judgment. Findings of fact and conclusions of law, and proposed amendments thereto, may be submitted for signature on or before February 23, 1935, after the filing of which judgment will be entered in favor of plaintiff and against defendant for the amount of the preference with interest at 5 per cent from March 10, 1933, less the amounts of the dividends declared by the receiver with interest thereon.

(Signed) FRED M. RAYMOND.
United States District Judge.

Dated February 15, 1935.

SUPREME COURT OF THE UNITED STATES.

No. 17.—October Term, 1936.

Mechanics Universal Joint Co., et al., Petitioners, *vs.* A. B. Culhane, Receiver.	On Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 9, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

Section 5242 of the Revised Statutes of the United States, 12 U. S. C. § 91 provides that payments made by a national bank "in contemplation" of the commission of an act of insolvency, "with a view to the preference of one creditor to another" "shall be utterly null and void."[1]

This suit was brought in the federal court[2] for northern Illinois by the receiver of the Manufacturers National Bank and Trust Company of Rockford, in that State, to recover, as such preference, the proceeds of a check for $42,761.12 drawn on the bank by the Mechanics Universal Joint Company of that city and paid to it. The answer denied that the bank was then insolvent; that it was known by its officers and directors to be so; that they contemplated the imminent necessity of its closing; and that the payment was made with a view to a preference. On these issues much evidence was introduced. The District Court, making detailed findings of fact, found on all those issues for the plaintiff, and entered a decree accordingly. The Court of Appeals, accepting the find-

[1] The Section provides: All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

[2] See 28 U. S. C. § 41,(1),(16); Commonwealth Trust Co. *v.* Bradford, 297 U. S. 613, 617. Compare Bowerman *v.* Hamner, 250 U. S. 504.

ings made by the trial court, affirmed the decree. 80 F. (2d) 147. We granted certiorari, because of the importance of the question whether the relation of the parties was such as to render the payment unlawful. (298 U. S. —). We accept the findings, as there was ample evidence to support them, and none of the objections to the admission of evidence is substantial. *Pick Manufacturing Co.* v. *General Motors Corporation* No. 12, decided October 26, 1936.

On Friday, June 12, the balance in the Company's account in the Manufacturers Bank was $65,224.30. On that day, the check for $42,761.12 was drawn, payable to the Third National Bank of Rockford, where it also had a general checking account, and was sent for deposit in that account. On Saturday, the 13th, the check was paid through the clearing house. Never before had the Company transferred money from its checking account in the Manufacturers Bank to its general checking account in the Third National. On June 12 and 13, 1931, the Manufacturers Bank conducted its business as usual. It accepted deposits; honored all checks, whether presented through the clearing house or otherwise; and paid all demands upon it. It had not committed any "act of insolvency." But it was, in fact, insolvent; and was known by its officers to be so. On June 13, it closed its doors at the conclusion of regular banking hours and it did not thereafter open them. On June 16, the Comptroller of the Currency certified that the bank was insolvent and appointed a receiver.

The check was executed by Ekstrom, the president and manager of the Company, who then was, and for two years had been, a director of the Manufacturers Bank. He knew its precarious condition. He knew that for some time prior to June 12 the bank had been on the special list of the Comptroller of the Currency for frequent examination and report. As early as January 8, 1931, the Comptroller had called the bank's attention to its unsatisfactory condition. In a letter dated May 28, 1931, he pointed out "its present dangerous situation" and "potential losses that threaten its solvency." Ekstrom, as director, had examined the reports of the bank's condition made by the National Bank Examiner; had read the letters from the Comptroller; and had been present at an informal meeting of the board, held upon request of the Examiner, on June 12 between eleven and twelve o'clock in the morning. The Examiner attended the meeting; discussed the bank's condition;

advised its officers and the directors that there would be a run on the Rockford banks on the following Monday; and told them "that the cash position of the Manufacturers Bank was so low that it could not stand a run of one business day." The directors authorized him "to talk over the affairs of the Manufacturers Bank with a view to having said bank taken over by some other bank in Rockford;" and appointed a committee to that end. Ekstrom participated in that action. Shortly after leaving the meeting, he signed the check and caused it to be sent by mail for collection.

First. The Company contends that, even if Ekstrom's purpose was to obtain for his Company a preference over other creditors, the withdrawal of the deposit was not unlawful. The argument is (a) that in drawing the check, and thus causing its payment, Ekstrom acted not as director of the bank but as president of the Company; (b) that he was neither an employee of the bank, nor specifically authorized as a director to make payment of the check; (c) that this payment was but one with many others which the bank made on the days involved, in the ordinary course of business, and not in contemplation of the commission of an act of insolvency; (d) that the payment cannot be held to have been made by the bank in contemplation of insolvency "with a view to prefer one creditor to another", since this check was paid, like others, in the usual course, without intention on the part of the bank's managing officers to prefer the Company; (e) that the wrongful action, if any, was that of Ekstrom in using for his Company's benefit knowledge obtained in confidence as director of the bank; but (f) that such breach of duty of a director does not entitle the receiver to recover, because the liability sought to be enforced is wholly statutory, and the statute does not provide that payments to a depositor on withdrawal made pursuant to confidential information obtained as bank director shall be void. The contention is unsound.

One of the objects of the national bank system is to secure, in the event of insolvency, a just and equal distribution of the assets of national banks among unsecured creditors, and to prevent such banks from creating preferences in contemplation of their failure. Compare *National Bank* v. *Colby*, 21 Wall. 609, 613-614; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 284, 290. To that end R. S. § 5242, 12 U. S. C. § 91, prohibits preferential payments. That prohibition is not directed solely to managing officers. The duty

not so to defeat the just and equal distribution of the assets commanded by the Act rests upon all who obtain such knowledge by reason of their connection with the bank—upon directors and employees as well as upon the executive officers.[3] By R. S. § 5147, 12 U. S. C. § 73, each director is required to take an oath that he "will not knowingly violate or willingly permit to be violated any of the provisions of this title." *Finn* v. *Brown,* 142 U. S. 56, 68. Ekstrom violated his oath and the duty under R. S. § 5242 which it imposed, when he used knowledge of the bank's perilous condition, gained in his position of trust, to cause the withdrawal of funds by his Company, with a view to assuring it a preference over other depositors who lacked that knowledge.

We have no occasion to decide whether a stranger would be liable as for a preference, if, without suggestion from any officer or employee of the bank, he withdrew his deposit because of rumor or suspicion of insolvency. It is true that ordinarily a payment made by a bank to a depositor in the usual course of business is not recoverable, even though the bank was then clearly insolvent. Compare *McDonald* v. *Chemical National Bank,* 174 U. S. 610. But the payment here in question was not made in the usual course of business; and the Company was not a stranger. Its president and manager was a director of the bank; as such acquired in confidence knowledge of its perilous condition; and, in violation of his statutory duty as director, used that knowledge for the purpose of preferring his Company. If the deposit withdrawn had been in Ekstrom's own name, he would, obviously, have been obliged to return it. The Company is in no better position. Compare *McCaskill Co.* v. *United States,* 216 U. S. 504; *Curtis, Collins & Holbrook Co.* v. *United States,* 262 U. S. 215. As it is liable under the statute, we have no occasion to decide whether it would be liable also on general principles of law or equity. Compare *Yates* v. *Jones National Bank,* 206 U. S. 158, 178; *Bowerman* v. *Hamner,* 250 U. S. 504, 510.

Second. Ekstrom was joined with the Company as co-defendant and was held liable with it, jointly and severally. For such personal liability there was ample basis. Knowing that the bank was in imminent danger of closing, it was Ekstrom's duty as director

[3] See Smith *v.* Baldwin, 69 F. (2d) 390; Schilling *v.* Sieroty, S. D. Cal., Cent. Div., August 21, 1934. Compare American Surety Co. *v.* Jackson, 24 F. (2d) 768; Isaacs *v.* Stock, 66 F. (2d) 928; Rucker *v.* Kokrda, 68 F. (2d) 73, 74; Pearson *v.* Durell, 77 F. (2d) 465, 467.

to conserve the assets for the benefit of all unsecured creditors—or specifically not to use that knowledge confidentially obtained to prefer his Company. He depleted the assets by causing the preference to be given; and thus violated the duty under R. S. § 5242, which he had sworn to perform. Compare *Bowerman* v. *Hamner*, 250 U. S. 504.[4]

Third. The Company sought by counterclaim to recover $20,034.12, the balance remaining after deducting from the aggregate of its deposits between May 6, 1931 and June 6, 1931 the checks drawn and paid in that period, including the check for $42,761.12 here in question. The claim is that when these deposits were made the bank was insolvent; that the deposits had been obtained fraudulently by impliedly representing (through keeping the bank open) that it was solvent; and that hence, the title to so much of them as came into the hands of the receiver remained in the Company, and could be followed as a trust fund. The Circuit Court of Appeals stated that it affirmed the action of the trial court dismissing the counterclaim on the ground that no fraud had been practiced by the bank on the Company and that "it was not an innocent depositor by reason of the acts of its president." The receiver gives additional reasons in support of that action. We have no occasion to enter far into the enquiry. Throughout the litigation the Company has insisted that the bank was still solvent on June 12 when the check in question was drawn, and on June 13 when it was paid. As to those dates the findings are to the contrary. But there is no finding that prior to June 12 the bank was insolvent, or that prior to the discussion at the informal directors' meeting its executive officers or directors believed it to be so. The evidence is clearly consistent with the conclusion that between May 6 and June 7 it was believed to be solvent. The counterclaim was properly dismissed. Compare *St. Louis and San Francisco Railway Co.* v. *Johnston*, 133 U. S. 566, 576; *Easton* v. *Iowa*, 188 U. S. 220, 232.

Fourth. The decree entered was for $25,216.45. That sum was arrived at by deducting from the $42,761.12 withdrawn, the aggregate amount of the dividends which would have been paid by the receiver to the Company thereon if that sum had remained on deposit, adding interest at 5 per cent to both the debit and the credits.

[4] Ekstrom having died January 12, 1936, his administratrix, Grace M. Ekstrom, was substituted as appellant.

The receiver contends that the defendants were wrongly credited with interest on the dividends, because no dividend was payable until full restitution with interest had been made of the illegal preference; and then only after proof of the Company's claim. We have no occasion to consider this alleged error in the decree as the receiver did not file a cross-petition for certiorari. Compare *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 66; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91; *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329, 331. Moreover, this claim was not made below in either court.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.